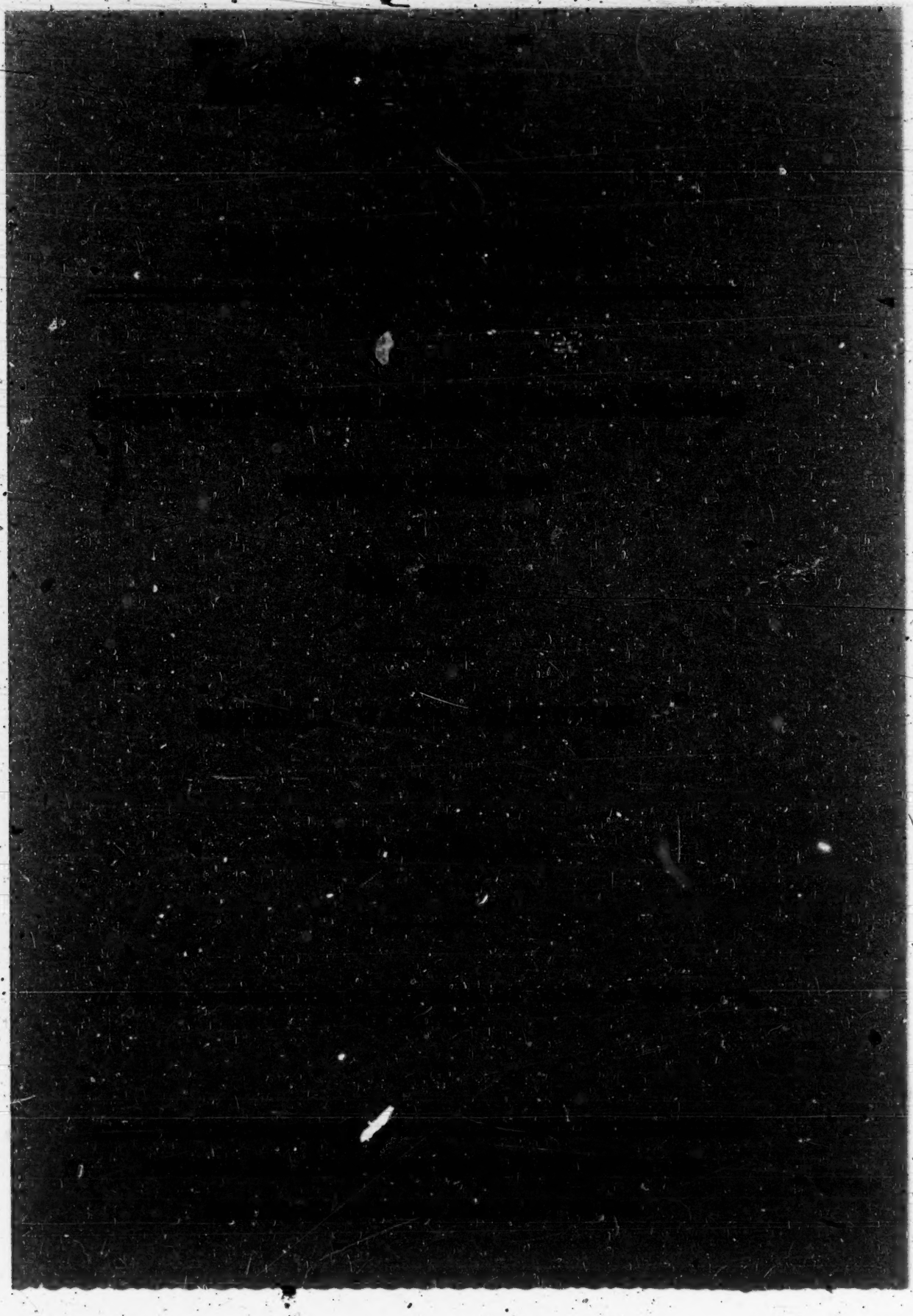


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 610

ROBERT A. WATTS, PETITIONER,

vs.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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[fol. 1]

IN CIRCUIT COURT OF SHELBY COUNTY, STATE OF INDIANA

ORDER FILING AND ASSIGNING INDICTMENT

The following Indictments are now filed and assigned to Criminal Court of Marion County Division Two, all pursuant to the order of the General Term of this Court, entered on November 19, 1947, in the General Term order Book Volume One Page 27.

Cr. 4522-Z Robert Austin Watts First Degree Murder

IN CIRCUIT COURT OF SHELBY COUNTY

ARRAIGNMENT AND PLEA

And afterwards towit, November 22nd, 1947, the same being the 120th Judicial day of the July Term 1947 of said court, before the Honorable Saul I. Rabb, Judge thereof, the following further proceedings were had herein towit:

State appears by Judson L. Stark, Prosecuting Attorney and Rufus Kuykendall, his deputy and Raymond Tindall, his deputy defendant appears in person and by counsel, Robert Rutherford and Henry Perry, defendant arraigned and pleads not guilty to each count of the indictment and reserves the right to file any pleadings and reserves the right to change his plea. This cause is now set for trial on December 8, 1947, at 9:30 A.M.

[fol. 2] In Circuit Court of Shelby County

State of Indiana

vs.

Robert Austin Watts

Motion to Quash Indictment

Comes now the defendant in the above entitled cause of action and moves the court to quash the indictment and each count thereof for the following reasons towit:

1. That in the selection of the Grand Jury Negroes, also known as colored persons, were excluded from serving on the grand jury because of their race and color.

2. That no person of Negro blood or colored person was permitted to serve on the grand jury that returned the indictment against defendant, who is a Negro.

3. That the grand jury which found the indictment had no authority to inquire into the offense charged.

4. That the indictment does not state facts with sufficient certainty.

5. That the indictment does not state facts sufficient to constitute a public offense.

Exclusion of persons from services on grand juries on account of race or color is a violation of 14th. Amendment to the Federal Constitution, Rogers v. Alabama, 192 U. S. 226..

If it should be claimed that in the selection of grand jurors persons were excluded from the jury on account of race or color, such fact should be taken advantage of by motion to quash an indictment returned by such jury, and not by an [fol. 3] application to remove the cause to a United States Court. Gibson v. Mississippi, 162 U. S. 565.

The proper mode to test the sufficiency of an indictment or information is by motion to quash, State v. Beach, 147 Ind. 74.

A motion to quash will raise the question as to the proper return and indorsement of the indictment Johnson v. State, 23 Ind. 32.

The defendant was without counsel and had no opportunity to file his said motion to quash prior to his arraignment.

Wherefore, defendant respectfully prays that said motion to quash be in all things sustained.

Henry Perry, Robert D. Ellison, Emerson J. Brunner, Warren M. Brown, Attorneys for defendant.

[fol. 4] IN CIRCUIT COURT OF SHELBY COUNTY

ORDER OVERRULING MOTION TO QUASH AND MOTION TO SUPPRESS

On the defendants, motion to quash heretofore filed, motion is now overruled exceptions to the defendant, the motion to suppress is overruled, exceptions to the defendant.

[fol. 5] IN CIRCUIT COURT OF SHELBY COUNTY, JANUARY TERM, 1948

No. 4723

THE STATE OF INDIANA

vs.

ROBERT AUSTIN WATTS

Hearing on Motion to Quash Indictment

Before the Honorable Harold G. Barger, Judge of the Shelby Circuit Court, on January 12, 1948, being the seventh judicial day of the January Term, 1948.

APPEARANCES:

For the State of Indiana: Judson L. Stark, Prosecuting Attorney, Marion County, Indiana; Glenn W. Funk, Deputy Prosecuting Attorney, Marion County, Indiana; Mr. Harold Meloy, Prosecuting Attorney, Shelby County, Indiana; and others.

For the Defendant: Mr. Henry Perry, Mr. W. S. Henry; Mr. Warren M. Brown, and Mr. Emerson J. Brunner; Mr. Robert Ellison.

[fol. 6] Mr. Scotty Scott, a witness called by the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. State your name, please.

A. Scotty Scott.

Q. And what is your address or residence?

A. 2721 Parrish Avenue, Indianapolis.

Q. Marion County, Indiana?

A. It is.

Q. How long have you lived in Marion County?

A. About seventeen years.

Q. And in your period of residence in Marion County, do you know of any occasion of negroes that served on the Grand Jury during the seventeen years?

Mr. Stark, Prosecuting Attorney: To which the State objects for the reason that it is just hearsay and doesn't have anything to do with this case.

Court: Objection overruled. Go ahead.

A. I do not.

Q. Now to your knowledge are there negroes, otherwise known as colored people, who are property owners and [fol. 7] competent to serve on Grand Jury in Marion County, to your knowledge?

A. There are.

Mr. Stark, Prosecuting Attorney: To which the State objects for the reason that he is not a lawyer and is not competent to pass on such questions.

Court: Part of the question calls for a conclusion, "and are competent to serve on Grand Jury", but I'll overrule the objection.

Q. Do you know they are property owners?

A. That's right, I do know that.

Q. Are you acquainted and know about the population of negroes in Marion County?

A. I do.

Q. About how many are there?

A. Sixty five thousand in the last estimate by the Chamber of Commerce.

Q. Are you acquainted and know about the general population of Marion County?

A. I am.

Q. About what is it?

A. About 486,000 in Marion County.

That's all.

[fol. 8] Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. You say your name is Scotty Scott?

A. That's right.

Q. You work for a paper, do you, in Indianapolis?

A. Indianapolis Recorder.

Q. Do you know who draws the venire for Grand Juries?

Mr. Perry, Attorney for Defense: I am going to object to that, "you know who draws the venire". That has nothing to do with whether negroes serve on Grand Jury.

Court: Objection overruled.

Q. Do you know who draws them?

A. I do not.

Q. Did you ever attend any drawing?

A. I have not.

Q. You don't know anything about how they were selected or how they were drawn at any time, do you?

A. I do not.

Q. You don't know whether there was any discrimination shown in selecting them at all, do you?

Mr. Perry, Attorney for Defense: I am going to object to that. The question is whether the negroes served on the Grand Jury. That's the only thing.

[fol. 9] Court: Objection overruled.

A. I do not know that, as to discrimination, I couldn't say.

Q. Do you know whether or not any negroes were actually called, selected and called in the selection of the Grand Jury?

Mr. Perry, Attorney for Defense: I'm objecting for the reason he says he didn't know of any that had served.

Court: Objection overruled.

A. Well, I don't recall any having said in my hearing and presence that they had been called for Grand Jury serv-

ice in Marion County. I don't remember any negroes having sat that had been called for Grand Jury service.

Q. You haven't examined the list to see whether or not any negroes were served to appear, have you?

A. I have not.

Mr. Perry: I'm objecting to that. This witness has no opportunity to go and serve the list and knows nothing about that. That's not in the line of this question.

Court: Objection overruled.

Mr. Henry, Attorney for Defense: I am objecting further—what list?

[fol. 10] Court: One attorney will make the objection.

Mr. Henry: I'll withdraw the objection.

Q. Mr. Scott, do you know which Grand Jury returned the indictment in the Burney case which we are now about to try?

Mr. Perry, Attorney for Defense: Object to that. No Burney case was spoken about to this witness. That's not cross-examination.

Court: That of course is the case that's being tried.

Mr. Perry: Your Honor, that's not cross examination. The only thing this witness was called to testify for was whether negroes have served on the Jury. The Burney case was not mentioned. It's not proper.

Court: Objection overruled.

A. The Grand Jury which returned the indictment was the one which served up until December 31st of last year.

Q. Do you know, have any knowledge of your own, that negroes were probably excluded from the list drawn and served and called as prospective Grand and Petit jurors?

A. I do not.

Mr. Perry, Attorney for Defense: I am objecting to that, [fol. 11] to go into this case. I am making objection to that. The only thing this witness was called to show whether he knows negroes served on Juries in Marion County during this term.

Court: Objection overruled.

Mr. Stark, Prosecuting Attorney: It's already been answered.

Court: Next question.

That's all.

Witness excused.

THOMAS ERVIN, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.
A. Thomas Ervin.
Q. And what is your address?
A. 2315 Guilford Avenue, Indianapolis.
Q. Is that in Marion County?
A. It is.
Q. You have been a resident of Marion County how long?
[fol. 12] A. Twenty one-years.
Q. And do you have any knowledge during the twenty-one year period you were a resident of Marion County, to your knowledge has any negroes, colored persons, served on Grand Jury during that term?

Mr. Stark, Prosecuting Attorney: I think, if the Court please, the State wants to object to that question. There is nothing in the law that requires that they shall, so it would be immaterial since there is no law that requires they shall. That's not the point.

Court: Objection overruled.

Go ahead.

A. I do not.
Q. Now you know to your knowledge of such negroes who are property owners, citizens, and voters of Marion County?
A. I think there is.
Q. And are you acquainted with the population of negroes in Marion County?
A. I am.
Q. And what would you say it is?
A. 65,000.
Q. And what would you say the general population is in Marion County?
[fol. 13] A. I think it is about a half million.

That's all.

No Cross-examination.

WILLIAM S. HENRY, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.
A. William S. Henry.
Q. And what is your address?
A. 305 Harvard Place, Indianapolis, Indiana.
Q. And that is in Marion County?
A. In Marion County, Indiana.
Q. You have been a resident there how long?
A. Forty-four years.
Q. And I will ask you within the last twenty-five years if you have any knowledge of any negroes or colored persons serving on Grand Jury in the last twenty-five years?
A. I have no knowledge of any such colored people serving on Grand Jury for the last twenty-five years in Marion County.

[fol. 14] Q. Do you know of negroes, otherwise colored people, that own real estate and are citizens and voters of Marion County?
A. I do.
Q. And to your knowledge about what is the population of negroes in Marion County?
A. Between sixty and seventy thousand.
Q. What is the general population of Marion County?
A. About four hundred eighty six or ninety thousand.
Q. Do you know how many persons are called for Grand Jury service? How many persons it takes to make a Grand Jury?
A. I think it's about six.
Q. And the Grand Jury is chosen how often?
A. Every—twice a year.
Q. That would make how many persons called in a year?
A. Twelve.
Q. During the last twenty-five years you don't know of any negroes serving?
A. I do not.

That's all.

No Cross-examination.

Questions by the Court, Judge Harold G. Barger questioning:

Q. Could there have been some called and you not know [fol. 15] about it?

A. No, they couldn't have been, Judge. I have been a lawyer there for thirty-eight years and I would have particularly known that had there been.

Q. You examine the list, do you?

A. The list wouldn't disclose, Judge. The objection I started to make there, there is no difference by the name of one man and the name of another one. The list wouldn't show colored or white. The list wouldn't show anything to the person who made the examination.

Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. Mr. Henry, you don't have any proof that there has been any actual discrimination on the part of the people who did the drawing, do you?

A. The only proof I have, Mr. Stark: the law says if there are colored people qualified to serve and not called upon to serve, it is discrimination per se.

Q. And were you present at the time of the selection of the last Grand Jury?

A. I was not.

Q. Do you know whether or not some negroes were called and put in the box and questioned as prospective Grand Jurors?

[fol. 16] Mr. Perry, Attorney for Defense: I am going to object to that question, whether they are "called." The question is that negroes have been excluded from serving. I don't care if they were called.

Mr. Stark, Prosecuting Attorney: You haven't put any proof in on it yet.

Court: Objection overruled.

A. I don't know of my own knowledge that they were called, but I will gamble that they weren't.

Mr. Stark: I'll take it further and swear they were. What do you think of that?

Court: Just ask your questions and the Court will rule on it. If you have any evidence, present it.

Q. You really then made no investigation to find out whether such was the case or not, did you?

A. I had no occasion——

Q. Just you did or you didn't, one or the other.

Mr. Perry, Attorney for Defense: I'm objecting——

Court: I'll withdraw the answer. Make your objection.

Mr. Perry: I'm objecting to the question, because this [fol. 17] witness is not a person who has access to the clerical list, not a part of the Jury Commissioners.

Court: Objection overruled.

A. No, I made no investigation, had no occasion so to do.

Q. And you haven't made any investigation or had any occasion so to do for the last twenty-five years, have you?

A. Only that there were none called out of the large number that were qualified.

Q. Mr. Henry, you don't mean not called. You mean unqualifiedly selected and sworn, don't you?

A. That's right.

That's all.

Witness excused.

Al Magenheimer, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to-wit:

Direction examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Al Magenheimer.

Q. Where do you live?

A. 40 South Alabama Street, the Marion County Jail.

[fol. 18] Q. And how long have you been a resident of Marion County?

A. Twenty-five years.

Q. And during the twenty-five years you have been a resident of Marion County, tell the Court, to your knowledge, if you have any knowledge of negroes, otherwise known as colored persons, serving on Grand Jury, and if so when it was and who it was.

A. I have no knowledge.

Q. And you are well acquainted with a large number of colored people around town, aren't you?

A. Yes.

Q. You know negro people that own real estate, don't you?

A. I do.

Q. And you are acquainted with the population of negroes in Marion County?

Mr. Stark, Prosecuting Attorney: That's been gone over and it's public knowledge. I don't see why we take up the time with such things.

Court: Objection overruled.

Q. It's over sixty thousand.

Q. And what would you say, in your opinion, is the general population of Marion County?

A. Over half a million.

That's all.

[fol. 19] Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. Mr. Sheriff, when you say you have no knowledge that they have served, you don't have any knowledge that they haven't served on Grand Jury either, do you?

A. I do not.

Q. You just haven't given any attention to that, is that right?

A. That's right.

Q. As Sheriff of Marion County, your deputies do serve the subpoenas for Grand and Petit Jurors, don't they?

A. That's right.

Q. And in that natural course of events you know whether or not colored people are frequently served upon these occasions?

A. We have quite a few papers to serve over there. I couldn't just say what they are. You see we serve over 6,000 papers per month.

Q. And you serve whatever list you are ordered as Sheriff to serve, do you not?

A. We do.

Q. Without regard to whether they are colored or white?
A. That's right.

That's all.

Witness excused.

[fol. 20] GLENN W. PARRISH, a witness called by the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.
A. Glenn W. Parrish.
Q. And where do you live?
A. Marion County, Indiana.
Q. How long have you lived in Marion County?
A. Fifty years.
Q. Now in the last twenty-five years, last thirty years, I will ask you if you know of any occasion that negroes, colored persons, any colored persons served on the Grand Jury, and if so, when and who it was.
A. No, I do not, Counsellor, I do not know.
Q. Now are you acquainted with the population—— Strike. You know a number of colored people in Marion County?
A. Quite a few, yes.
Q. To your knowledge are they property owners and voters there?
A. Yes.
Q. And are you pretty well acquainted with the population—what would you say the population is of negroes in [fol. 21] Marion County?
A. I think the last survey of the Chamber of Commerce gave 65,000.
Q. And what would you say—now what would you say the general population is?
A. I think it's 460,000; 465,000, something like that.
Q. Now do you know how many grand jurors served at a time?
A. Yes, sir.
Q. How many?

A. Six.

Q. And for how long a period?

A. One term of Court, six months.

Q. That would make twelve a year?

A. Twelve a year.

Q. And do you know how they are selected?

A. Yes, sir.

Q. All right. Tell the Court.

A. Their names are drawn from a box by the duly qualified jury commissioners.

Q. And who sends out for these names, do you know?

A. The sheriff.—Oh, for the names? Pardon me, sir. The Secretary of the Jury Commissioners gets the name. Is that the point you wanted?

Q. Who sends out for the names?

A. The Secretary of the Jury Commissioners.

Q. Who is that?

[fol. 22] A. Claycombe, Bob Claycombe.

Q. Each jury commissioner writes out the names of the persons?

A. Yes.

Q. Where does he get the names?

A. Gets them from the tax list.

Q. That's the general list of the whole——

A. —Yes, all the tax payers of Marion County.

Q. You don't have any personal knowledge, you say, of any negroes serving in the last thirty years?

A. No.

Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. You are the deputy clerk, aren't you?

A. Yes.

Q. You have seen those tax duplicates yourself, haven't you?

A. Yes, sir.

Q. It doesn't show on those whether a person is colored or white, does it?

A. No, it doesn't.

Q. You haven't seen any evidence of discrimination on the part of the jury commissioners of the names drawn, have you?

A. None whatever.

Q. When you say the jury commissioners draw the names, you mean the County Clerk actually draws the names out, [fol. 23] of the box, doesn't he?

A. That's right.

Q. As a matter of fact, they are all shook up and drawn out and written down in the order they are pulled out, isn't that right?

A. That's right.

Q. In that box there are a good many colored people's names, isn't that right?

A. Yes, sir.

Q. You have seen that happen, haven't you?

A. Many times.

Q. You were up there now the last time the Jury was so drawn, weren't you?

A. Yes.

Q. Did you see any colored people drawn from the Jury box?

A. Yes, sir.

Q. And selected?

A. Yes, sir.

Q. Of course, you did. That's all.

Redirect examination.

Questions by Mr. Perry, Attorney for Defense:

Q. I want the names of those colored people that were drawn in this jury the last time, if you were there and in [fol. 24] the Clerk's office, I want to know who they were and I want them in Court. Who were they?

A. I do not know. I don't know.

Q. I want their names and their addresses.

A. No, I can't remember that well.

Q. Now, how many names are drawn from the box for Grand Jury service at a given time?

A. Seventy-five.

Q. And how many were drawn in this case that's before the Court?

A. Seventy-five.

Q. Who appoints the Grand Jury from the list that is drawn up?

Mr. Stark, Prosecuting Attorney: I want to object to that because this man is not a lawyer. You don't appoint them. It's a question of selecting them according to law.

Q. Who made the selection of this particular Grand Jury?

A. The judges of the January term of Criminal Court assisted by the Prosecutor.

Q. The judges assisted by the Prosecutors? And out of the seventy-five names that were drawn for this Jury was a negro chosen among the six?

A. No.

Q. And you can't give any name of any negro for thirty years that has even been called for jury service, can you?

[fol. 25] A. Oh, no.

That's all.

Recross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. You don't know that some haven't served, do you, in the last thirty years? You haven't looked at all of them, have you?

A. No, to my knowledge, that's all. My knowledge doesn't cover the entire——

Q. You don't know that's what it is one way or the other, do you?

A. No.

Q. And when you talk about those that are called and selected for possible service, without knowing the names, you can tell——

Mr. Perry, Attorney for Defense: I am objecting to him testifying.

Court: Wait till he finishes his question; then you can object.

Q. —by looking at them whether they're colored or not, can't you?

A. No, sir.

Q. I mean when they come into the room, can't you?

A. Oh, yes, sir.

Q. That's the way you can tell, by seeing them, that [fol. 26] they have been put into the box?

Mr. Perry, Attorney for Defense: Object to this man testifying. I am asking him to give names and addresses.

Court: Do you have any questions to ask. If you do, ask them.

Questions by Mr. Perry, Attorney for Defense:

Q. You testified that the Prosecutor of Marion County helped select the Jury that is trying this man?

A. Yes, sir.

Q. The Grand Jury?

A. Yes, sir.

Q. And the proportion of negroes in Marion County, according to statements given by you is seven to one, is that correct?

A. That's about right, yes.

Q. In thirty years, to your knowledge, you can't name one that has been called?

Mr. Stark, Prosecuting Attorney: We object to the repetition. We have been over that once. How many times are we expected to go over it?

Court: I'll sustain the objection. The question has [fol. 27] already been asked and answered.

Mr. Perry: Your Honor, I haven't asked the question of whether—I asked the proportion of negroes in Marion County is seven to one. Now in the thirty-years you know of any negroes being called to jury service, and he says no, and now out of the seventy-five——

Mr. Stark, Prosecuting Attorney: If the Court please——

Court: Let's just keep the record clear and one of you at a time.

Mr. Perry: That's all.

Questions by Mr. Stark, Prosecuting Attorney:

Q. As a matter of fact, don't you know that the Judges of the January Term, that the judges of both courts are the ones that select the Grand Jury and the first Petit Jury that becomes the regular panel?

A. Yes, sir.

Q. Not the prosecutor?

A. The prosecutor, I said, assists.

Q. Well maybe looking up information——

[fol. 28] A. —looking up information.

Mr. Brown, Attorney for Defense: Oh, no we object to that.

Mr. Stark: I'll withdraw that part.

Q. Well, you know, as a matter of fact, the Prosecutor has no authority in the matter at all, don't you?

A. None whatsoever.

Mr. Stark: You're excused.

Questions by Mr. Perry, Attorney for Defense:

Q. You say the Prosecutor assisted. In what way did he assist?

A. In advising the Court, just the same as the Clerk, or any of us. The Court being duly advised acts in certain ways.

Q. He advised in the selection of the Grand Jury and there were no negroes chosen on it?

A. No.

That's all.

Witness excused.

[fol. 29] Judson L. Stark, a witness called by the defense, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Judson L. Stark.

Q. And what is your address?

A. 5306 Kenwood, Indianapolis.

Q. And how long have you been a resident of Marion County?

A. About twenty-five years.

Q. And during the twenty-five years of your residence, how many negroes or colored persons have served on the Grand Jury, been called or served on the Grand Jury, to your knowledge?

A. I don't know. They are not required to, according to law. I know that much.

Court: Just answer the question.

A. I don't know.

Q. Now are you acquainted with a lot of colored people in Marion County?

A. Naturally.

Q. You know if there are colored people that own real estate and are residents and voters, you know that?

[fol. 30] A. Well, I strongly suspicion it. I haven't looked at any of the deeds, but I am rather certain that some of them do.

Q. You believe there are taxpayers among the colored people?

A. Oh, yes, indeed, certainly.

Q. To your knowledge what would you say the population of negroes is in Marion County?

A. I imagine about sixty-five or seventy thousand. I don't know.

Q. And what would you say the general population is?

A. Oh, in Marion County, you say?

Q. That's right.

A. Oh, half a million, more than that.

Q. Now you know how the Grand Jury is chosen. Tell the court how.

A. It's contained in the Statutes, just exactly how it is done.

Q. I am asking you to tell the Court.

A. All right. I shall. The Courts in Marion County, by statute, hold two terms per year. That is not true of all courts, but it is of Marion County. Then the terms run from January 1st until June 30th, and then from July 1st to *January* 31st. At the beginning of each six months term, or prior thereto, as a matter of fact, to selecting the Grand Jury and the Petit Jury to get the regular panel, the [fol. 31] Jury Commissioners, upon order of the Judge, or upon order of the Judges, select, pursuant to law, names to go into a Jury Box. They select a large, rather large number. The law has from time to time varied on that subject.

How the Jury Commissioners select these names: they select them without regard to whether they are white or colored. They put them in the Jury Box; then on the day appointed as provided in the order and pursuant to law the County Clerk,—in this case, A. Jack Tilson—takes the box, which is under lock and key, as the Jury Commissioners have the key so that neither can get into it himself. He

shakes that around thoroughly; then the Jury Commissioners open it. The County Clerk sticks his hand in and just draws out one name from a box containing a large number of names, both white and colored, and the first name drawn out is written down. Then No. 2, 3, 4, 5, until about seventy-five, whatever the Court has ordered, is drawn. That's the prospective Grand Jury list. Then they continue on drawing of about two hundred names to make up the regular panel; that is the first panel.

Q. That's the Grand Jury?

A. No, no. Then they draw out some more names to make up the petit jury.

[fol. 32] Q. I am just speaking of the Grand Jury.

A. I have told you how they did that. Then those names, subpoenas are gotten out ordering them to appear at a given time as prospective grand jurors. The sheriff goes and serves the subpoenas. The names are already selected by somebody else but he serves the subpoenas, is ordered to serve them. Then they come in. When they come in to the Court Room, the two judges sit at the table and the Sheriff or the Clerk, I don't know which one, Clerk I imagine, calls the first name; that man goes into the box, it doesn't matter who he is; then they call No. 2, call No. 3, 4, 5, 6. Then the judges begin questioning them to see whether or not they are qualified under the statute to serve as grand jurors.

There are several reasons that could excuse him. Sometimes one of them will say he is ill; maybe his wife is dangerously ill, and there are various and sundry reasons why a Court or Judge, at their discretion, may excuse one from grand jury service. The term runs for six months and it is not uncommon for the Court to hear pleas of a legitimate nature, to be released. Now the Prosecuting Attorney, however, has no power whatsoever to do any of that. It is true that they have from time to time looked up the qualifications and run the records on names, so as to be sure we [fol. 33] don't get anyone with any bad background in there. Any information of that kind is gotten at the request of the Judge handed on. Otherwise, the Prosecuting Attorney has nothing whatsoever to do with the selection of the Grand Jury.

Q. In what way, if any, did the Prosecutor assist in this last case?

A. You mean the Grand Jury that indicted Watts?

Q. Yes. Was that a regular proceeding or was it a special in this last——

A. You mean the selection of the Grand Jury?

Q. Yes.

A. It was done very regularly.

Q. And how many Grand Jurors' names—withdraw.

Were you present at the time of the selection of this last Grand Jury?

A. The one that indicted Robert Watts?

Q. Yes.

A. No, I wasn't present, but my deputies were. I mean my deputies went down and saw——

Mr. Brown, Attorney for Defense: That answers the question.

A. —that they shook up the box and things of that kind.

Mr. Brown: Move to strike out all that he has said after the word no.

[fol. 34] Court: It may go out, everything after the word no.

Q. Now were any of your deputies present?

A. Yes, my deputies are a part of me, according to law. They act in my name, place, and stead, the law says.

Q. How many names of Grand Jurors are in the box at the time when the six names are drawn?

A. I have never been permitted to look into it. I couldn't tell you. I can't tell how many names are in a box that's close to me.

Q. You don't know how many names are put in the box?

A. No.

Q. Did you ever try to find out?

A. Well, no, we never went through and counted all the people because they draw more names out of this same box.

Q. These names that go into the Grand Jury box, where do they come from?

A. That is the business of the Jury Commissioners, under instruction of the Judge of the Probate Court. The law has been changed on that subject in the last year.

Q. Do you know where the names come from that go in the box?

A. I am not present when other people do their duty. I presume they do it.

[fol. 35] Q. Do you know where they come from?

A. No, I don't. I know what the law says, but I wasn't present.

Mr. Perry, Attorney for Defense: Move to strike out all that he doesn't know.

Court: It may go out.

Q. How many persons would serve on Grand Jury in twenty-five years at the rate of twelve a year?

A. That calls for a mental operation, multiplication. You can multiply.

Q. I am asking you.

Court: I don't think he has to answer that question. I think it would be around three hundred. You can figure it for yourself, but I don't think he has to answer that question. That calls for a computation that he doesn't have to answer.

Q. I think, your Honor, he could multiply.

Court: I will sustain the objection.

Q. And you say out of three hundred persons serving on grand jury service for twenty-five years, you don't know of one negro among those three hundred, do you? If you [fol. 36] do, who was it, what is the name and address?

A. I don't know of any, but there has been years when I do know——

Mr. Perry: Move to strike it out.

Court: "I don't know of any" may stay in. The rest may go out.

Q. Now you saw the Grand Jury that was chosen for Robert Watts didn't you?

A. Yes.

Q. Were there any negroes on it?

A. No.

That's all.

Mr. Meloy, Prosecuting Attorney: No questions.

Witness excused.

Mr. Stark (to Court): If the Court please, if I said the Probate Court chose the election commissioners, if I said the Probate Court did that—they say I did—I meant the Circuit Court.

Court: You said the Probate.

Mr. Stark: I meant the Circuit.

Mr. Henry, Attorney for Defense: That's all.

[fol. 37] At this point the Court recessed.

After recess, the following proceedings were had, to-wit:

JUDSON L. STARK, a witness called by the State, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Meloy, Prosecuting Attorney:

Q. You are the same Judson L. Stark who testified previously?

A. I am.

Q. And what is your official capacity in Marion County?

A. Prosecuting Attorney of Marion County.

Q. And have you served previously in that capacity?

A. Yes.

Q. You may tell the Court when.

A. I was Chief Deputy from 1925 beginning January 1, '25 for four years; then Prosecuting Attorney from January 1, 1929 to January 1, 1931.

Q. And you have been Prosecuting Attorney in Marion County now since when?

A. Since 1947, January 1st.

Q. And you have also been Judge in Marion County?

[fol. 38] A. Yes, I was Judge of Marion Superior Court, Room 1, from January 1, 1943, until I became Prosecutor this time.

Q. And in your official capacity as Prosecuting Attorney now and previously in other official capacities, have you been familiar with the method of selection of Grand Juries in Marion County?

A. Yes, I have been.

Q. Now I will ask you if in your knowledge any persons were excluded from serving on the Grand Jury at any time because of their race or color or for any other reason.

Mr. Henry, Attorney for Defense: We will object to that question for the reason that would call for a conclusion, "because of race or color." The only question is, as the law lays it down, whether or not they were excluded and

had an opportunity to have been appointed, but in attempting to show "because of race or color" that would be a conclusion and would be wholly incompetent and not evidence in such an answer.

Court: Objection overruled.

A. There never has been any discrimination or effort to keep names out of the box or keep any colored person in Marion County from serving on either Grand or Petit [fol. 39] Jury.

Mr. Perry, Attorney for Defense: I am objecting to that, these conclusions of this witness. I am objecting to that.

Court: Objection overruled.

Mr. Perry: I am objecting to the question because it calls for a conclusion.

Court: He has already answered the question.

Mr. Perry: Move to strike it out.

Court: Motion to strike out overruled.

Q. Within the last three years, Mr. Stark, do you know of any incidents where any colored or negro persons have been called on the Grand Jury Venire?

A. I believe that three were called,——

Mr. Perry: I am objecting on the——

A. —on the Grand Jury venire.——

Mr. Perry: I am objecting to that question.

A. —Let me explain.

Court: Just a minute.

A. —At any rate jurors drawn from the same box——

Mr. Perry: I'm objecting.

A. —were put on.

[fol. 40] Court: I'll sustain the objection. I don't think that's responsive.

(Question read to Court: Within the last three years, Mr. Stark, do you know of any incidents where any colored or negro persons have been called on the Grand Jury venire?)

Court: Everything outside of "I believe three were called" may go out.

Q. Now those names are drawn from the same box as the Petit Jury, are they?

A. That's right.

Q. And have negroes been called and served on Petit Juries in Marion County?

Mr. Perry, Attorney for Defense: I am objecting to that question. The only question we are raising is for the Grand Jury, in this motion to quash.

Court: They're drawn out of the same box. Objection overruled. I'll admit it for whatever it may be worth.

(Question read to witness: And have negroes been called and served on Petit Juries in Marion County?)

A. I know they have been called, put in the Jury Box.

[fol. 41] Mr. Perry, Attorney for Defense: I'm objecting to the answer.

Court: Objection overruled.

Q. Petit Juries, now.

A. Yes. As to whether or not—as to the question of actually serving or not—I remember last year, I believe in the Fruster Jones case, or another one—Mr. Perry was defending as pauper attorney. She was excused peremptorily after answering the questions perfectly, a very fine colored person, I'd say, the wife of a dentist——

Mr. Perry: I'm objecting——

Court: Just a minute. We are just going to have one person talk at one time, because the Court Reporter can't get everybody's talk in the record, and when you have any objections to make——

Mr. Perry: I want to make an objection——

Court: —wait until the question is answered and then you can make your objection;——

Mr. Perry: I am objecting to the question——

Court: —Just a minute! —and make your answers [fol. 42] responsive to the question, Mr. Stark, or otherwise I will have to strike them out, and we will waste a lot of time, which isn't necessary.

Mr. Stark: I am trying to, Your Honor.

Mr. Perry, Attorney for Defense: I want to explain: in this question he mentioned my name on this case and I wasn't even up there. I move my name be stricken out of the record.

Court: Just a minute now. It's already in.

(Answer read again to Court: Yes. As to whether or not —as to the question of actually serving or not—I remember last year, I believe in the Fruster Jones case, or another one—Mr. Perry was defending as pauper attorney. She was excused peremptorily after answering the questions perfectly, a very fine colored person, I'd say, the wife of a dentist——)

Court: That may go out. It isn't responsive. Everything as concerns the Jones case may go out. It isn't [fol. 43] responsive. Next question.

That's all.

Cross-examination.

Questions by Mr. Henry, Attorney for Defense:

Q. Mr. Stark, were you the Prosecuting Attorney in June, I believe, last year, when this last Grand Jury was selected?

A. That's right, selected in July.

Q. And your deputies, I believe you testified on the examination direct when you were on the stand before, that you weren't present but your deputies were there, some of your deputies were there.

A. I think one of my deputies was there.

Q. You have testified that there was a box in which the names of the seventy-five persons were selected?

A. From which they were drawn.

Q. That's what I am speaking of.

A. More than that was drawn.

Q. But seventy-five was drawn from which to draw the panel of the Grand Jury out of that box?

A. Whatever the record shows up there. I didn't look at the Court's order.

Q. Now do you, you don't know whether or not—— Withdraw that.

[fol. 44] There were colored people that appeared in the box, that's what you said, isn't it?

A. Yes.

Q. And you believe that there were three colored names drawn from that box from which the selection would be made?

A. I do know there were names in the box and that they were drawn out, colored.

Q. But you do know that when it came time to make the final selection that it was very convenient for the colored names to be eliminated?

A. No, I don't know. It isn't even the truth.

Mr. Meloy, Prosecuting Attorney: Object to that.

Mr. Henry: I'll withdraw that.

Court: Strike that question out, please.

Q. You do know that the colored names were eliminated from the selection?

A. No, I do not.

Q. You don't——

Mr. Meloy: Object——

A. Let me answer it.

Q. You don't know of any——

Court: Just a minute. You are not letting the witness answer the question, and the Prosecutor over here is making an objection.

[fol. 45] Mr. Henry: He had answered it, but he didn't make any motion to strike, so no question is before the Court.

Court: He started to say something else. Just give them a little time to answer questions.

Q. But now, you do know that after the names are selected from the box from which the Grand Jury is selected——

A. —drawn from the box.

Q. Drawn from the box then. Out of that number selection is made and I believe you testified that the Court makes the selection?

A. That's right. They come in numerical order, No. 1 first.

Q. And no colored man was ever named in your experience as Juror No. 1?

A. In the Grand Jury, you mean?

Q. Yes.

A. Well I don't know who was put in the box at that time, or why they were excused, if they were, but when it was

finally finished the Jury didn't have—there was no colored person on the Grand Jury.

Q. Yes. Now then during the twenty-five years that you have lived in the City of Indianapolis, out of a large number of colored people that live there and are voters and property owners, no colored person, to your personal [fol. 46] knowledge, has ever been selected to serve on Grand Jury?

A. Well I don't know that because I haven't seen all of them.

Q. Don't you know, Mr. Starks, that such an unusual thing as that would have called your attention to it?

A. I don't know that.

Q. You never have heard of any colored man serving on Grand Jury, have you?

A. Well I don't know whether I have or not. It wouldn't surprise me if one did.

Q. During your actual practice of twenty-five years you haven't heard of that, have you?

A. That's right.

Q. You have been Prosecuting Attorney much of that time, haven't you?

A. That's right.

Q. Judge part ~~of~~ that time?

A. That's right.

Q. Had a colored man served on the Jury wouldn't you have known it?

A. Not necessarily. In fact I would just as soon have a colored man on there as a white man. It wouldn't surprise me any. I wouldn't remember anything about it at all.

Q. But you have never heard of such a thing, have you? [fol. 47] A. I don't recall whether I have or not. I don't recall. That's the truth. I might have.

Q. You have a better recollection than I have, if you have. Now, Mr. Stark, you know as Prosecuting Attorney and as a former Judge, that the law has provided that where colored people live in sufficient numbers and are excluded for a period of ten, fifteen, twenty years, it is an exclusion because of race prejudice?

Mr. Meloy, Prosecuting Attorney: Object to that.

Court: Objection sustained. That would only call for a conclusion on his part.

Mr. Henry: I just asked him if he knows that to be a law.

Mr. Meloy: I am objecting.

Court: Sustained.

Q. Now then I believe you testified that your office assisted in the selection of the Grand Juries.

A. I didn't say that. Somebody else said that. I did say that we are interested enough that we run some records and make some little investigation and make that available if it is anything very bad, but we have nothing to say about who is really selected. In fact we don't even question the witnesses at all.

[fol. 48] Q. You want to change that evidence that you gave sometime ago that you assisted?

A. I never said that. Somebody else said that.

Q. You have a very bad memory, do you?

A. My memory is good.

Court: Just a minute. We'll not have a—we're not here for the lawyers to display their intellectual capacities.

Mr. Henry: That's all.

Witness excused.

Mr. Glenn W. Funk, a witness called by the State of Indiana, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Meloy, Prosecuting Attorney:

Q. You may state your name.

A. Glenn W. Funk.

Q. And your official capacity in Marion County?

A. Chief Deputy Prosecutor, Marion County.

Q. And how long have you served in that capacity?

A. Since March 1st, 1947.

Q. Do you know, from your own knowledge from whence [fol. 49] names come which are put on Grand Jury venire?

A. I do.

Q. From whence?

A. They are taken from a list of the taxpayers of Marion County, placed in a jury box, and from that box the names are drawn.

Q. And do you know of any occasion where a name of a negro or colored person was drawn for Grand Jury?

A. I do.

Q. When was that?

A. January term, 1948.

Q. And how many were drawn, if you know?

A. I know definitely of two.

Q. Men or women?

A. Men.

Q. And you may state whether or not they actually served on Grand Jury, if you know.

A. They did not.

Q. And if you know the reason, you may so state.

A. They asked to be excused.

Mr. Perry, Attorney for Defense: I am objecting to that. Move to strike it out, for the reason that if there were people called for Grand Jury, they should be brought here in Court. That's the best evidence, and this witness has no reason to {fol. 50} testify why they were excused. That's a conclusion on his part.

Court: I'll let it go out.

A. I was present at the selection.

Q. The two colored persons were actually in the Jury Box, were they?

A. That's right.

Q. And did you hear anything they said to the Judge?

Mr. Brown, Attorney for Defense: If the Court please, didn't this witness testify this occur-ed in 1948?

A. That's correct.

Mr. Brown: This was long prior to that time. In the interest of time the defendant objects.

Court: I am sustaining the objection as to what happened there. As to the showing they were drawn I will overrule that. Next question.

Mr. Meloy: That's all.

[fol. 51] Cross-examination.

Questions by Mr. Perry, Attorney for Defense:

Q. How long have you lived in Marion County?
A. Since 1927.
Q. About twenty-one years?
A. That's right, Mr. Perry.
Q. And to your knowledge has any negroes, colored persons, served on the Grand Jury in Marion County during that time?
A. To my knowledge?
Q. Yes.
A. No.

Mr. Perry: That's all.
Mr. Meloy: That's all.

Witness excused.

And this was all the evidence given in the hearing on Motion to Quash Indictment.

[fol. 52] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 53] In Circuit Court of Shelby County

Verdict and Judgment

Verdict of the Jury

We, the Jury, find the defendant, Robert Austin Watts, guilty of murder in the first degree while engaged in an attempt to perpetrate the crime of rape as charged in the second count of the indictment herein, and that as punishment therefor he do suffer death.

Alvin B. Coons, Foreman.

Judgment

It is therefore ordered, adjudged and decreed by the Court that the defendant Robert Austin Watts is guilty of Murder in the first degree while engaged in an attempt to perpetrate the crime of rape as charged in the second count

of the indictment herein; that as punishment therefor he do suffer death, that said punishment of death shall be inflicted by causing to pass through the body of the said Robert Austin Watts a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of said Robert Austin Watts until said Robert Austin Watts is dead. The Court fixes the 10th day of May, 1948 before the hour of sunrise on said day as the time at which said death sentence shall be carried out, by the Warden of the Indiana State Prison, or, in case of his death, disability, or absence, his deputy.

Said execution shall take place inside the walls of the Indiana State Prison, at Michigan City, Indiana, in a room arranged for that purpose.

[fol. 54] IN CIRCUIT COURT OF SHELBY COUNTY

[Title omitted]

DEFENDANT'S MOTION FOR NEW TRIAL

(Excerpts)

Comes now the above defendant, Robert Austin Watts, and moves the Court for a new trial in this case for the following reasons and upon the following grounds, towit:

Number One

Irregularities in the proceedings of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this towit:

(a) That the Court erred in overruling the motion of the defendant, Robert Austin Watts, to quash the indictment filed herein and each count thereof.

* * * * * * *

Number Eighteen

Errors of law occur-ing at the trial in this towit: That the Court erred in overruling the objections of the defendant to the introduction in evidence of State's Exhibits Numbered 26, 27 and 28 offered by the State and objected to by the defendant after it had been proven by the Defendant

that said confession was made by the defendant while under the influence of fear produced by threats and intimidations and undue influence and after the Defendant had been confined in jail and treated with unnecessary rigor, which offers, objections and rulings of the Court were in the words and figures following, towit:

Q. All right. I will ask you—I will hand you State's Exhibit Number 26 again and ask you to note a change in the typing by ink and initialing in the margin there. Take a look at that.

A. There.

Q. Was that done the same night?

A. It was.

[fol. 55] Q. And were you present when that change was made?

A. I was.

Q. Was the defendant Watts present?

A. He was.

Q. And look at the initial in the margin. What initial is that?

A. R. W.

Q. Who put them there?

A. Robert Watts.

Q. Was it explained to him at that time what the correction was for?

A. It was.

Q. Now, Mr. Reasner, I will hand you also State's Exhibit Number 27 and ask you when you saw that.

A. November 18th, about 3 A. M. in th- morning.

Q. Was that shortly after these other exhibits here were written up there?

A. Yes, sir.

Q. Was that at State Police Headquarters?

A. State Police Headquarters, Stout Field.

Q. I will ask you if you know whose signature is attached to the bottom of that?

A. Robert A. Watts.

Q. Is that this defendant?

A. Yes.

Q. In whose presence was that signature placed there?

A. Sheriff Magenheimer, myself, Robert Shields, and Captain Barton.

Q. And do all those names appear on there as witnesses?
A. They do.
Q. Did you see all of them put their names on there?
A. I did.
Q. Was that in the presence of the defendant?
A. It was.
[fol. 56] Q. Were those all present when the defendant signed his name?
A. They were.
Q. Any other person present at the time?
A. Yourself.
Q. Now had you been present at the time this State's Exhibit 27 was taken from the defendant Robert A. Watts?
A. I was present.
Q. And who took the statement?
A. You did, Mr. Stark.
Q. And state whether or not the statement was written down or was dictated to a stenographer.
A. It was dictated to a stenographer.
Q. Who was present other than myself and yourself?
A. Robert Watts, Sergeant Shields, and John Barton.
Q. And after it was reduced to writing or typing, I will ask you if before the defendant signed it and before these names were attached as witnesses, if this State's Exhibit Number 27 was read to the defendant Watts.
A. It was.
Q. By whom?
A. Yourself.
Q. I will ask you if, whether the defendant Watts was given an opportunity to look at it himself.
A. He was.

Mr. Stark, Prosecuting Attorney: Now the State will offer in evidence——

(The exhibits were handed to Defense Counsel to read and compare before being offered in evidence.)

At this point a recess was taken.

After recess, the following proceedings were had, to-wit:

[fol. 57] Mr. Stark: State offers in evidence its exhibits 26, 27 and 28.

Mr. Brunner, Attorney for Defense: Let the record show that the defendant objects to the introduction of these

exhibits for the reasons heretofore stated. (i.e., that anything that was said by the defendant to this officer, in the presence of officers, was made under the influence of fear, produced by force, threats, and intimidation.)

Mr. Perry, Attorney for Defense: For the further reasons: No. 1, that the confessions or statements were made by the defendant when he was without Counsel. No. 2, that the defendant was not properly advised as to his constitutional rights to testify and that he did not have to make any statement unless he wanted to and that if he did sign any statements it would be used against him in Court. No. 3, that the said confessions and statements violate Section 58 of the Constitution of the State of Indiana. No. 4, that said confessions or statements violate the 5th, 6th and 14th Amendments to the Federal Constitution. No. 5, that the State has not proven the corpus delictae of its case before offering the confessions or statements of this defendant.

Court: Objection overruled.

Show State's Exhibits 26, 27, and 28 introduced in evidence and read and read to the Jury.

[fol. 58] IN THE SUPREME COURT OF INDIANA, NOVEMBER TERM, 1947

No. 28447

ROBERT AUSTIN WATTS, Appellant

vs.

STATE OF INDIANA, Appellee

ASSIGNMENT OF ERRORS—Filed June 30, 1948

The Appellant says that there is manifest error in the judgment and proceedings in this cause in the following particulars:

1

The Court erred in overruling appellant's motion for a new trial.

2

The Court erred in overruling appellant's motion to quash the indictment herein and each count thereof.

3

That the Court erred in overruling appellant's verified motion to suppress evidence.

4

That the Court erred in overruling the appellant's written motion for a directed verdict of not guilty as to each count of the indictment herein filed after the State of Indiana had rested its case in chief.

5

That the Court erred in overruling appellant's written motion to instruct the jury to find the appellant not guilty as to each count of the indictment herein after the conclusion of the evidence in chief of the appellant, the rebuttal evidence of State of Indiana and the surrebuttal evidence of the appellant.

6

That the Court erred in refusing to discharge the jury on motion of appellant for misconduct of counsel for State of Indiana in making remarks in argument.

[fol. 59]

7

That the Court erred in refusing to give to the jury instruction Number 8 tendered by the appellant.

8

That the Court erred in refusing to discharge the jury on motion of the appellant for misconduct of counsel for the State of Indiana during cross examination of appellant.

9

That the Court erred in compelling the appellant to answer questions which the appellant had indicated to the Court that he declined to answer because he chose to exercise his constitutional right and refused to answer said questions for the reason that the answer to which might tend to incriminate him for a crime or an alleged crime or subject him to a criminal prosecution.

10

That the Court erred in overruling appellant's motion to reopen the case and hear further evidence.

11

That the Court erred in admitting in evidence State's Exhibit Number 26.

12

That the Court erred in admitting in evidence State's Exhibit Number 27.

13

That the Court erred in admitting in evidence State's Exhibit Number 28.

14

That the Court erred in admitting in evidence State's Exhibit Number 29.

Wherefore, the appellant prays that the judgment be reversed.

(Signed) Warren M. Brown, Attorney for Appellant.

[File endorsement omitted.]

[fols. 60-60a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61]. IN THE SUPREME COURT OF INDIANA

No. 28447

ROBERT AUSTIN WATTS, Appellant,

vs.

STATE OF INDIANA, Appellee

APPEAL FROM THE SHELBY CIRCUIT COURT

Come now the parties by counsel and the court, being advised in the premises, Affirms the judgment of the court below with the following opinion pronounced by Starr, C. J.

OPINION—December 20, 1948

The appellant was tried upon an indictment returned by the Grand Jury of Marion County in two counts; the first of which charged murder in the first degree of one Mary Lois Burney by shooting; and the second charged the same murder while attempting to rape the said Mary Lois Burney. To this indictment appellant entered a plea of not guilty and a special plea of insanity. Appellant was convicted on the second count and sentenced to be electrocuted. The errors assigned will be considered in the order presented by the briefs.

Appellant attempted to question the indictment by a motion to quash, which was overruled by the trial court. The appellant is a member of the negro race. The only reason [fol. 62] urged for the sustaining of this motion was that in the selection of the grand jury, which returned this indictment, negroes were excluded from service because of their race and color. This question cannot be raised by a motion to quash. Any irregularity in the selection, impaneling or swearing of a grand jury must be raised by a plea in abatement. *Bottorff v. State* (1927) 199 Ind. 540, 156 N. E. 555; *State v. Jackson* (1918) 187 Ind. 694, 121 N. E. 114. A motion to quash an indictment only reaches matters apparent on the face thereof. §9-1129 Burns' 1933, 1942 Replacement; *State v. Jackson*, supra; *Katzen v. State* (1922) 192 Ind. 476, 137 N. E. 29; *Bottorff v. State*, supra, and does not authorize searching the record preceding the indictment. *Swain v. State* (1939) 215 Ind. 259, 18 N. E.

(2d) 921; *Bottorff v. State*, supra. It was not error, therefore, to overrule this motion.

In passing, however, we desire to state that the trial court did hear evidence on this motion, which evidence was contradictory. There was ample evidence from which the trial court would have been justified in finding that negroes were not so excluded from the Grand Jury of Marion County which returned this indictment. For example, one witness, Glenn Funk, testified that within the past two years he knew of two negroes who were drawn as members of a jury in the Marion County Criminal Court, but they did not serve. Another witness, Judson L. Stark, the Prosecuting Attorney of Marion County, testified that the drawing was regular and that names are selected for jury service without regard as to whether they are white or colored; [fol. 63] that there were three negroes called on the grand jury venire within the last three years. Another witness, Glenn W. Parrish, a deputy clerk, testified that no discrimination was shown in selecting names to go into the jury box; that there are many colored persons names in the box, and that he had seen the names of colored persons drawn from the box and selected. See *Swain v. State*, supra. There was no proof of a systematic effort to exclude negroes from jury service.

Appellant insists that the court erred in admitting in evidence his written confession of the crime charged. It is contended that the undisputed evidence shows that this confession was made by the appellant under the influence of fear produced by threats, intimidation and undue influence, which renders this confession inadmissable in evidence as provided by §9-1607 Burns' 1933, 1942 Repl.

At the time, during the trial, when the exhibits incorporating appellant's confession were offered in evidence by the State, appellant objected to these offers on the ground that they had been signed by appellant under the influence of fear produced by threats, intimidation and undue influence. Thereupon, out of the presence and hearing of the jury, the trial court accorded a full hearing on the issues presented by the objection. Appellant's evidence was to the effect that he was not guilty; that prior to his confession he had been beaten, starved, threatened and otherwise abused to such an extent that he signed his confession under the influence of fear. This evidence was contradicted in detail by the testimony of various competent witnesses who

[fol. 64] testified for the State. This evidence on admissability being conflicting, the court's ruling adverse to appellant cannot be questioned in this appeal as we cannot weigh the evidence. *Dixon v. State* (1946) 224 Ind. 327, 67 N. E. (2d) 138; *Hawkins v. State* (1941) 219 Ind. 116, 37 N. E. (2d) 79; *Hicks v. State* (1937) 213 Ind. 277, 11 N. E. (2d) 171, 12 N. E. (2d) 501; *Anderson v. State* (1933) 205 Ind. 607, 186 N. E. 316. This case is not controlled by *Johnson v. State* (1948) — Ind. —, 78 N. E. (2d) 158. There the evidence suggesting force and coercion was undisputed.

If appellant's confession was not made under the influence of fear produced by threats, intimidation or undue influence, then the fact that, before making his confession, he was taken from place to place in Indianapol[illegible]nd held for several days without process, would not [illegible] be sufficient in this state to withhold the confession. *Hicks v. State*, supra.

By virtue of §9-1706 Burns' 1933, 1942 Replacement, the trial court saw fit, before trial, to have appellant examined by physicians as to his sanity. Appellant stated in his brief that it was error to overrule his objection to the report of these physicians. We assume that he intends, by this objection, to question the competency of the testimony of these physicians. Appellant, in his brief, has failed to point out why it was error to overrule this motion, or the basis of his objection, or to cite any authorities, or to show wherein he was harmed. By this failure, no question is raised. Rule 2-17 (f) Rules of the Indiana Supreme Court, 1946 Rev. [fol. 65] Appellant insists that it was error for the trial court to refuse to instruct the jury to find the appellant not guilty at the close of all the evidence. It is his contention that the *corpus delicti* was not proven. The State's evidence was to the effect that the deceased had met a violent death resulting from assault with a deadly weapon. This, considered with the confession, was ample to establish the *corpus delicti*. *Hurst v. State* (1944) 222 Ind. 599, 56 N. E. (2d) 493; *Evans v. State* (1927) 199 Ind. 55, 155 N. E. 203; *Griffiths v. State* (1904) 163 Ind. 555, 72 N. E. 563; Ewbank's Indiana Criminal Law (2d Ed.) §517.

Misconduct of the prosecuting attorney in his closing argument is charged. In this argument he stated to the jury, "If he (referring to the appellant) gets life in the Indiana State Penitentiary, according to the rules of the

Penitentiary, they are permitted a year of parole after 12 years service." This was proper argument as the prosecutor had the right to express his opinion as to the amount of punishment the jury should mete out. *Blue v. State* (1946) 224 Ind. 394, 67 N. E. (2d) 377. The court's admonishment to the jury to disregard these remarks and not to consider them, was more than fair to the appellant.

Also, it is complained of that the prosecuting attorney in his cross examination of the appellant, questioned him as to the identity of two certain knives, and in doing so displayed the same to appellant; whereupon, appellant stated that from where he was stationed, he was unable to see them.

[fol. 66] The prosecutor then stated "This is as close as we want you to have them." The jury was then admonished by the court not to consider this remark. Also, it appears that in this cross-examination the prosecutor, when the witness answered a certain question in an argumentive way, stated that his answer was a "darn lie." The jury was also admonished not to consider this remark of the prosecutor.

It is our opinion that, although the foregoing remarks of the prosecutor are not to be condoned, they were not of sufficient gravity or importance as to warrant the setting aside of the submission. The court's action in telling the jury not to consider these remarks was sufficient to warrant a fair trial.

Appellant complains of the court's refusal to give his tendered instruction No. 8. He has failed in his briefs to set out any of the instructions that were given by the court. Error, therefore, cannot be predicated on this refusal. Rule 2-17 (e) of this court, as to the requirements of appellant's brief, provides among other things: "When error is predicated on the giving or refusal of instructions the statement must recite all of the instructions that were given; "It will be presumed that the instruction so tendered and refused, was covered by other instructions. *Adams v. State* (1938) 214 Ind. 603, 17 N. E. (2d) 84.

The next question presented is that the appellant was compelled to answer certain questions over the objection that the same would tend to incriminate him. It is sufficient [fol. 67] to say that all these questions were asked on cross examination of appellant about a matter about which he had elected to testify as a witness in his own behalf. In

view of his direct examination, the allegedly prejudicial questions were proper on cross examination. *State v. Schopmeyer* (1935) 207 Ind. 538, 194 N. E. 144.

It is urged that the verdict is not sustained by sufficient evidence. The evidence most favorable to the state is substantially as follows: that on the morning of the 12th day of November, 1947, the deceased was alive; that later that day her body was found in the bedroom of her home in Indianapolis; that she had been killed by the discharge of a shotgun, the charge of which had struck her in the head; that the evidence disclosed that the gun had been fired at close range, and that she had been killed in the room where her body was found. The evidence also disclosed, that prior to her death there had been a struggle between her and her assailant as was indicated by the bruises on her body and the general disarray and condition of the furniture in the home; that on the same day another woman in the same neighborhood had been attacked in her home by a colored man who was attempting to rape her; that she escaped him by fleeing from her house naked; that on the same day and before the offense charged herein had been discovered, appellant was arrested for this attempted rape and identified by this woman as her attacker; that thereafter the appellant made a full written confession of his guilt of the offense herein charged; that shortly after mak- [fol. 68] ing this confession, he led the officers in whose custody he was, to a lonely place in the City of Indianapolis, where he had tossed the shotgun. This spot was far from the scene of the crime. The gun was still there. This gun was the property of the husband of the deceased and he had kept it in the home where he and deceased resided; that the empty shotgun shells found at the place of the crime had been fired from this gun. It also appears from the State's testimony, that the appellant admitted the perpetration of this crime to a fellow prisoner while he was being held in the Marion County Jail.

It is our opinion that this evidence amply supports the verdict, although the State detailed other and further evidence which it is not necessary to recite for the purpose of this opinion.

Lastly, it is insisted that a new trial should have been granted on account of newly discovered evidence. After

both sides had rested, and before argument, appellant moved to reopen the case for the purpose of introducing certain evidence. The only purpose of this evidence would have been to impeach a certain witness of the State on a collateral matter which would have rendered it inadmissable. It was not error to deny this motion. Had this evidence been discovered after the trial, and had it not been irrelevant, but simply impeaching, a new trial could not have been granted on account of same. *Sullivan* v. *State* (1937) 212 Ind. 79, 6 N. E. (2d) 951; *Gavalis* v. *State* (1922) 192 Ind. 42, 135 N. E. 147; *Spaulding* v. *State* (1904) 162 Ind. 297, 70 N. E. 243.

Finding no reversible error, the judgment is affirmed.

[fol. 69] IN SUPREME COURT OF INDIANA

ORDER DENYING PETITION FOR REHEARING

And afterwards, to wit: On the 11th day of January 1949 the Court, being fully advised, denied the petition for rehearing heretofore filed herein by appellant on January 7, 1949.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 344, Misc. —

On petition for writ of Certiorari to the Supreme Court of the State of Indiana.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—FEBRUARY 28, 1949.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in*

forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same hereby, granted. The case is transferred to the appellate docket as No. 610.

The stay order of January 31, 1949 is continued and it is ordered that execution of the sentence of death be stayed pending the final disposition of this case by this Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

610

No. 610

ROBERT AUSTIN WATTS,

Petitioner,

vs.

STATE OF INDIANA,

Respondent

BRIEF FOR PETITIONER

ROBERT L. CARTER,
FRANKLIN H. WILLIAMS,
THURGOOD MARSHALL,
Counsel for Petitioner.

WARREN M. BROWN,
EMERSON J. BRUNNER,
WILLARD B. RANSOM,
HENRY J. RICHARDSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 610

ROBERT AUSTIN WATTS,

Petitioner,

vs.

STATE OF INDIANA,

Respondent

BRIEF FOR PETITIONER

Opinion of Court Below

The opinion of the Supreme Court of Indiana has not been reported officially but appears at Pages 37 to 43 of the printed record.[1] Petition for rehearing was denied on the 11th day of January, 1949, without opinion. (R. 42)

Jurisdiction

Judgment of the Circuit Court of Shelby County, Indiana, was entered on the 28th day of January, 1948 (R. 30-31); affirmed by the Supreme Court of Indiana on the 20th day of December, 1948 (R. 42) and petition for rehearing was over-

[1] Page references "R. —" are to pages in the printed record. Page references "O. R. —" are to pages in the original record.

ruled on the 11th day of January, 1949. (R. 42) Petition for certiorari to review the judgment of the Supreme Court of the State of Indiana affirming the conviction was filed on the 14th day of February, 1949, based upon 28 United States Code, section 1257 and was granted by this Court on the 28th day of February, 1949. (R. 42)

Statement of the Case

Petitioner, a young Negro, was arrested by law-enforcement officers of Marion County, Indiana, on the 12th day of November, 1947, upon suspicion of crime. (O. R. 360, 728) Subsequently, without prior hearing, he was indicted by a grand jury of Marion County for the alleged murder of Mary Lois Burney, a white woman. (R. 1) After arraignment on the 22d day of November, 1947 (R. 1), a motion for change of venue was granted (O. R. 15) to Shelby County, Indiana.

Prior to trial, petitioner moved to quash the indictment returned against him upon the ground that Negroes were systematically excluded from grand jury service in Marion County solely because of their race or color. (R. 2-3) Petitioner further moved to suppress certain alleged confessions obtained from him by state officers through the use of force, duress and intimidation, (O. R. 32-35) and subsequently objected to the admission into evidence of such alleged confessions. (R. 33-34) The trial court overruled these motions (R. 4, 57) and denied petitioner's motion for a new trial in which these errors were specifically preserved. (R. 31-34) Upon appeal to the Supreme Court of Indiana, these two substantial constitutional questions were raised (R. 34-36) and decided adversely to petitioner by the said Court through affirmance of the conviction (R. 37-42) and denial of a petition for rehearing (R. 42).

The material facts concerning the exclusion of Negroes from jury service and the method of obtaining the alleged confession are set forth and discussed in the argument herein.

Errors Relied Upon

A

THE COURT ERRED IN AFFIRMING THE CONVICTION OF PETITIONER, A NEGRO, BASED UPON AN INDICTMENT RETURNED BY A GRAND JURY FROM WHICH NEGROES HAD BEEN SYSTEMATICALLY EXCLUDED SOLELY BECAUSE OF RACE AND COLOR IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

B

THE COURT ERRED IN AFFIRMING THE CONVICTION OF PETITIONER BASED UPON CONFESSIONS OBTAINED BY STATE OFFICERS THROUGH THE USE OF FORCE, DURESS AND INTIMIDATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Summary of Argument

I

Where substantial federal questions have been raised and passed upon in a state court, this Court will make an independent examination of the evidence: *Haley* v. *Ohio*, 332 U. S. 596; *Patton* v. *Mississippi*, 332 U. S. 463; *Malinski* v. *New York*, 324 U. S. 401; *Ashcraft* v. *Tennessee*, 322 U. S. 154; *Ward* v. *Texas*, 316 U. S. 547; *Lisenba* v. *California*, 314 U. S. 219.

II

The lower court erred in affirming the conviction of petitioner based upon an indictment returned by a grand jury from which Negroes were systematically excluded solely because of race or color.

A. Evidence adduced at hearing upon motion to quash clearly established systematic exclusion of Negroes:

Patton v. Mississippi, supra; *Smith v. Texas*, 311 U. S. 128; *Patterson v. Alabama*, 294 U. S. 600; *Norris v. Alabama*, 294 U. S. 587; *Rogers v. Alabama*, 192 U. S. 226; *Carter v. Texas*, 177 U. S. 442; *Bush v. Kentucky*, 107 U. S. 110, 122; *Neal v. Delaware*, 103 U. S. 370; *Strauder v. West Virginia*, 100 U. S. 303.

B. General statements of good faith by state officials were wholly insufficient to overcome evidence of long-continued exclusion of Negroes from jury service: *Patton v. Mississippi*, supra, *Smith v. Texas*, supra.

III

The lower court erred in affirming the conviction of petitioner based upon confessions obtained by state officers through use of force, duress and intimidation.

A. Circumstances surrounding the obtaining of the alleged confessions herein clearly establish their involuntary nature.

B. Use of such confession and affirmance of conviction based thereon violate the Fourteenth Amendment: *Haley v. Ohio*, supra; *Malinski v. New York*, supra; *Ashcraft v. Tennessee*, supra; *Lisenba v. California*, supra; *Chambers v. Florida*, 309 U. S. 227; *Brown v. Mississippi*, 297 U. S. 278.

ARGUMENT

I

This Court will independently examine evidence in support of claim of violation of rights protected by United States Constitution where such claim is properly raised and denied by State Court.

Throughout the proceedings in the courts of Indiana, petitioner claimed that rights protected by the United States Constitution had been denied him because of the systematic exclusion of members of his race from grand juries in the

county where the indictment returned against him was found. (R. 2-3, 31, 34) Petitioner further claimed throughout the proceedings that the use of confessions obtained through the use of force, duress and intimidation by state officers violated rights guaranteed him by the Fourteenth Amendment. (R. 3, 31, 33-34, 35-36) At each stage, these rights were denied by the Indiana state courts. This Court will examine and appraise the evidence as it relates to petitioner's constitutional rights, *Smith* v. *Texas*, supra, at 130, so as to determine the validity of the claim, *Lisenba* v. *California*, supra, at 237, and whether such rights were denied either in express terms or in "substance and effect." *Norris* v. *Alabama*, supra, at 589; *Ward* v. *Texas*, supra, *Malinski* v. *New York*, supra; *Asheraft* v. *Tennessee*, supra; *Haley* v. *Ohio*, supra; *Patton* v. *Mississippi*, supra.

II

The Supreme Court of Indiana erred in denying petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States by affirming his conviction based upon an indictment returned by a grand jury from which all qualified Negroes were systematically excluded solely because of race or color.

An independent examination of all of the evidence adduced at the hearing upon petitioner's motion to quash will reveal the following uncontradicted facts:

1. That no Negro served on the grand jury that indicted petitioner. (R. 21)

2. That for at least twenty-five to thirty years prior to the indictment of petitioner, no Negro had served on a grand jury in Marion County. (R. 4, 7, 8, 10-11, 12, 17, 21, 27, 30)

3. That Negroes constituted at least one-seventh of the general population of the county in which petitioner was indicted. (R. 4-5, 7, 12, 18)

4. That there were many Negroes in Marion County qualified for jury service. (R. 4, 6, 8, 10)

Petitioner called six witnesses in support of his motion, who testified as follows:

Scotty Scott, a newspaperman and resident of Marion County for seventeen years, testified that of a general population of approximately four hundred and eighty-six thousand (486,000), there are approximately sixty-five thousand (65,000) Negroes[2] and that to his knowledge there are Negroes who are property owners and competent to serve on grand juries, though he does not know of any occasion when Negroes served on a grand jury of that county. (R. 4-6)

Thomas Erwin, a local newspaperman, resident of Marion County for twenty-one (21) years, testified that he had no knowledge of any Negro who had served on a grand jury in the county during that time and confirmed the above-quoted population figures. (R. 7)

William S. Henry, resident for forty-four (44) years, and a member of the Bar of Marion County for thirty-eight (38) years, stated that a total of twelve grand jurors serve each year; that he knows of no Negro who served in such a capacity during the last twenty-five (25) years, though he knows Negroes who are residents, citizens, and property owners of the county. (R. 8-10) Upon being examined by

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[2] 16th Census Report on Population, 1940 shows Marion County, Indiana's general population figures to be: Total population, 460,926; White, 408,890; Negro, 51,949. Table 21, part 2, Vol. II.

the Court concerning Negro grand jurors, the following question and answer were made:

> "Q. Could there have been some called and you not know about it?
>
> "A. No, they couldn't have been, Judge, I have been a lawyer there for thirty-eight years and I would have particularly known that had there been." (R. 9)

Al Magenheimer, Sheriff of Marion County, resident thereof for twenty-five (25) years, testified that he had no knowledge of any Negro serving on a grand jury of the county for the last twenty-five (25) years, though he is well-acquainted with a large number of colored people who own real estate. (R. 10-2)

Glenn W. Parish, Deputy Clerk of Marion County, resident thereof for fifty (50) years, testified that during the last twenty-five (25) or thirty (30) years, he knew of no occasion where a colored person had served on a grand jury, though he knows that a number of colored persons vote and own property in the county. He further stated that the last survey of the Chamber of Commerce showed that of a population of about four hundred and sixty thousand (460,000) persons, sixty-five thousand (65,000) thereof were colored. He also testified that the jury commissioners write out the names of prospective jurors from the tax duplicates, which do not indicate the race of the taxpayer, place the names in a box and that thereafter the County Clerk actually draws the names out of the box and writes them down in the order of drawing. (R. 12-17)

On redirect examination, this witness stated that out of seventy-five (75) names drawn for the grand jury venire at the term of Court at which petitioner was indicted, six (6) jurors were chosen, none of whom was a Negro. (R. 14) He further stated that the Prosecutor of the county helped the judges select the jurors (R. 15) and advised the Court thereon.

Judson L. Stark, prosecuting attorney of Marion County; resident thereof for twenty-five (25) years, testified as to the population ratio of the county and that names of prospective jurors are drawn from the jury box without regard to whether they are white or colored; that the names drawn are written down in order until seventy-five (75) have been so listed, this number then constituting the prospective grand jury list; that subpoenas are then issued to such persons and served by the Sheriff; that upon response to the subpoenas, the prospective jurors are questioned by the judge and that the prosecuting attorney ". . . from time to time looked up the qualifications and ran the records on names so as to be sure we don't get anyone with any bad background in there."; that of three hundred (300) persons serving on grand juries in the county over the past twenty-five (25) years, he does not know of any Negro having so served and that there was no Negro on the grand jury that indicted petitioner. (R. 17-21)

This testimony was sufficient to make a prima facie showing of systematic exclusion of Negroes from grand jury service in Marion County solely because of race or color. *Neal* v. *Delaware*, supra; *Norris* v. *Alabama*, supra; *Pierre* v. *Louisiana*, 306 U. S. 354; *Patton* v. *Mississippi*, supra. As stated by this Court in the *Patton* case, supra:

> "When such a showing was made, it became a duty of the state to try to justify such exclusion as having been brought about by some reason other than racial discrimination."

The State of Indiana failed to sustain the burden. Two witnesses were called by the state in opposition to the motion to quash. One of these witnesses was the prosecuting attorney of Marion County. The other witness was the chief deputy prosecutor of Marion County.

The first witness, Judson L. Stark, prosecuting attorney, had a record of county public service from 1925 and claimed familiarity with the method of selection of grand juries in Marion County. He testified: "There never has been any discrimination or effort to keep names out of the box or keep any colored person in Marion County from serving on either Grand or Petit Jury." (R. 23.) He further testified that: "*I believe* that three were called," in response to a question as to whether any Negroes were called on the grand jury venire within the last three years. (R. 23.) (Italics ours.)

On cross-examination, he stated that at the time of drawing the grand jury that indicted petitioner seventy-five (75) names were drawn from the jury box and of this number some were Negroes (R. 26). However, "when it was finally finished the jury didn't have—there was no colored person on the grand jury" (R. 26-27). It should also be noted that this witness denied that he was present when the names were drawn. (R. 20, 25.)

Glenn W. Funk, chief deputy prosecutor of Marion County since March, 1947, testified that the names of two Negroes were drawn at the January, 1948, term. (R. 29.) This term followed the term of Court at which the grand jury indicting petitioner was drawn. The witness further stated that no Negro had served on a grand jury in Marion County during his residency there since 1927. (R. 30.)

In considering this evidence, the Supreme Court of the State of Indiana found: "There was no proof of a systematic effort to exclude Negroes from jury service", relying therefor on the testimony of Glenn W. Funk to the effect that the names of two Negroes were drawn at the January, 1948, term of the grand jury. Apparently, the Court entirely overlooked or discounted the fact recognized by the trial court that such term followed the court term at which

petitioner was indicted and accordingly such evidence had no bearing upon the motion to quash.

Further, the Supreme Court of Indiana relied in its opinion upon the general assertions of Judson L. Stark and Glenn W. Parish to the effect that there was no discrimination in the selection and drawing of names for service on grand juries. (R. 38.)

Such general assertions of nondiscrimination cannot be considered adequate justification for the complete exclusion of Negroes over a period of twenty-five to thirty years from grand jury service in Marion County. As stated by this Court in *Neal* v. *Delaware*, *supra*:

> "We think that this evidence failed to rebut the strong prima facie case which defendant had made. That showing as to the long continued exclusion of Negroes from jury service, and as to the many qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement."

Apparently, the Supreme Court of Indiana ". . . regarded as irrelevant the key fact that for thirty years or more no Negro had served on the grand . . . juries. This omission seriously detracts from the weight and respect that we would otherwise give to its conclusion in reviewing the facts, as we must in a constitutional question like this." *Patton* v. *Mississippi*, *supra*.

It is well settled that a Negro defendant is denied equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States whenever through state action Negroes are systematically excluded

solely because of race or color from the grand jury which indicts, or the petit jury which convicts him.

In the *Patton* case, *supra*, the general rule having been reiterated, this Court stated that:

> "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." (92 L. Ed. (Adv. Sheets) 164, 167.)

The Indiana Supreme Court refused to apply this principle to the facts of the instant case. Such refusal constituted a denial of petitioner's claim of violation of rights guaranteed him by the Fourteenth Amendment to the United States Constitution within the meaning of decisions of this Court. *Patton* v. *Mississippi*, *supra*; *Pierre* v. *Louisiana*, *supra*; *Hale* v. *Kentucky*, 303 U. S. 613; *Hollins* v. *Oklahoma*, 295 U. S. 394; *Martin* v. *Texas*, 200 U. S. 316.

III

The lower court erred in affirming conviction based upon confessions obtained by State officers through use of force, duress and intimidation.

In the case of *Chambers* v. *Florida*, *supra*, where a conviction based upon confessions induced by fear and duress was reversed, this Court reemphasized the challenging role of our judiciary in such cases, stating:

> "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. * * * No higher duty, no more solemn responsi-

bility rests upon this Court than that of translating into living law and maintaining these constitutional shields deliberately planned and inscribed for the benefit of every human being subject to our constitution of whatever race, creed, or persuasion" (at p. 241).

In the instant case, the uncontradicted testimony shows that petitioner, a Negro, was arrested on Wednesday, November 12, 1947, some time between 12:30 (O.R. 360) and 2:40 in the afternoon (O.R. 728-729). After questioning by police in the office of the Marion County jail (O.R. 361-362), he was placed in Cell No. 7 (O.R. 446), commonly known as "the hole." (O.R. 363, 447, 581.) This cell, approximately six by four feet, with walls, ceiling and floor made of steel (O.R. 365) or iron (O.R. 448), had a small hole about six by four inches in the front door, which was kept locked (O.R. 365-366), no light (O.R. 448), bed (O.R. 448, 455), chair (O.R. 366), heat (O.R. 567), or water tap (O.R. 366), and its only fixture was a toilet (O.R. 448). After an alleged identification by one Miss Stout, (O.R. 368-371), petitioner was kept in this cell until approximately 11:45 P. M. (O.R. 372).

That night at 11:30 or twelve midnight (O. R. 744), he was removed from the cell, taken first to the jail's front office (O. R. 374), questioned and then taken to headquarters of the state police (O. R. 376), when he was again questioned by various officers until about 2 A. M. on the 13th (O. R. 378-379; 744). From two o'clock until three or four A. M., he was subjected to a lie detector test (O. R. 379, 685, 766) and following this was again questioned by officers until six the next morning (O. R. 381-383), at which time he was returned to "the hole" (O. R. 384).

At 9:30 A. M. on the 13th, petitioner was again removed from his cell (O. R. 385), subjected to an identification proceeding (O. R. 386) then taken in a state police car to

visit various places throughout the city (O. R. 388) until some time in the afternoon (O. R. 395).

During the afternoon, at state police headquarters, until approximately 6:30 the following morning (O. R. 407), he was questioned by a large number of officers (O. R. 403) in at least five different places (O. R. 674-675) and then returned to jail. That morning, the 14th at approximately 9 A. M., he was taken to the prosecutor's office (O. R. 409) where he talked to a man by the name of Lynch (O. R. 410), then taken in an auto to search for various articles (O. R. 411, 609), upon his return he was subjected to a lie detector test (O. R. 414) and again questioned until some time between two (O. R. 610) and eight o'clock the next morning (O. R. 423) at which time he was returned to solitary confinement.

The following morning, the 15th, at 9:30 A. M., he was again taken on an auto trip with officers to various places throughout the city, returned to police headquarters and again questioned until approximately noon (O. R. 423-425). He was taken on another auto trip until approximately 3 o'clock (O. R. 428-429), returned to police headquarters and subjected to a lie detector test (O. R. 429), then returned to solitary (O. R. 436). At approximately six or seven P. M., he was again taken to state police headquarters and questioned until early in the morning some time between 2 (O. R. 431-436) or 8:30 A. M. (O. R. 421), when he was placed again in "the hole," where he was left all day Sunday, the 16th (O. R. 438).

At about 8:30 Monday morning (O. R. 438), he was again taken on an auto trip by state officers (O. R. 613), returned to police headquarters (O. R. 613) and questioned concerning numerous crimes (O. R. 426-437) and subjected to such questioning during the morning (O. R. 439), afternoon (O. R. 439, 1127) and again most of the night (O. R. 439). He finally broke and confessed to having committed the

crime for which he was later charged and sentenced some time between 3 and 4:30 A. M. on the morning of the 18th (O. R. 483).

During all of this period from the 12th through the 18th, petitioner was held without being arraigned or taken before a magistrate for hearing (O. R. 487) as required by the laws of Indiana,[3] until after his confession (O. R. 19-20). The Supreme Court of the state, in its opinion, admitted that this irregularity had occurred (R. 39).

At no time was petitioner advised of his right to remain silent or to have assistance of counsel (O. R. 645-646) nor were friends or relatives allowed to visit him prior to the 18th (O. R. 559, 562). During most of these periods, except while in solitary, and once or twice while in the auto, petitioner was handcuffed (O. R. 374-377, 404).

By reference merely to this undisputed testimony, but one conclusion can be reached, namely, that petitioner's conviction herein must be reversed because it was based upon a confession obtained through the use of force, duress and intimidation, rendering its character involuntary in violation of rights guaranteed him by the Fourteenth Amendment. The facts and circumstances which were uncontradicted establish that the confession was not the result of the free choice of petitioner but rather flowed from the long gruelling questioning and physical exhaustion brought about by state officers while held incommunicado and without due process.

Though the fact alone that a confession was obtained while in the custody of police and in response to examination by them will not necessarily affect its voluntary character, such circumstance will be considered. Also, the fact of an extended delay in arraignment or application to a magistrate for committal, the holding of defendant incom-

[3] Burns Indiana Statutes, 1942 Repl., section 9-704.

incommunicado without opportunity to see counsel or friends, *Ward* v. *Texas*, *supra*; *Malinski* v. *New York*, *supra*, and subjecting him to long and gruelling questioning by a large number of officers; *Ward* v. *Texas*, *supra*, must be considered. All of these facts are present in the instant case and though the conviction may have been based only in part upon the confession obtained in this manner, its use is sufficient to warrant reversal by this Court. *Malinski* v. *New York*, *supra*.

Further testimony, which in some few parts was conflicting, was as follows: Petitioner claims that his clothes were taken away from him and he was kept naked wearing only socks except when removed from the jail (O. R. 367). He further testified that he was beaten by the police (O. R. 399-402, 479) and this is denied by all of them, though petitioner's wife stated that when she saw him after the 18th, his face was swollen and his eyes were red (O. R. 565). Petitioner claims that from arrest to the time he confessed seven days later, the only food he received was four sandwiches (O. R. 415, 489), two bottles of milk (O. R. 415, 489), two apples (O. R. 489), a coca cola (O. R. 364, 404) bread and water (O. R. 438). The only clear contradiction of this was from the sheriff who claims that petitioner was fed regularly, such claim lacking the probability of truth in view of the lengthy periods of time that petitioner admittedly was away from the jail and the custody of the sheriff.

Petitioner further claimed that just prior to signing the confession, he was informed that a mob of five hundred people had gathered to get him (O. R. 443, 481); that unless he signed his wife and baby might be harmed (O. R. 443, 482) and that he did sign only after a telephone call was made to his wife and he was allowed to say "hello" after which the police hung up (O. R. 498). Though these statements are denied by state's witnesses, they are partially

supported by the wife's testimony to the effect that she did receive such a telephone call (O. R. 563).

In reviewing the cumulative evidence, the Supreme Court of the State of Indiana stated:

> "This evidence on admissibility being conflicting, the court's ruling adverse to appellant cannot be questioned in this appeal as we cannot weigh the evidence" (R. 39).

In such ruling, the Indiana Supreme Court entirely ignored the sufficiency of the uncontradicted evidence, giving undue weight to that which was contradicted and thus overruled petitioner's claim of federal right as set forth in his Assignment of Error Number Eighteen presented to that Court, wherein petitioner specifically incorporated his objection "that the said confessions and statements violate . . . the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution" (R. 34). At a minimum, the uncontradicted evidence shows that petitioner was questioned by numerous police officers in various places throughout the city of Indianapolis at all times of the day and night over a period of approximately seven days, with little respite; that during such periods of respite, he was confined in a bare, cold cell with no chair or bed; that during this time he was held illegally and incommunicado without the advice of friends or counsel and constantly subjected to the fear of further and more severe intimidation and coercion.

A confession obtained under such circumstances clearly was not voluntary and its use violates provisions of the Fourteenth Amendment. As stated by this Court in the recent case of *Haley* v. *Ohio*, *supra*:

> "The Fourteenth Amendment prohibits police from using the private, secret custody of either man or child as a device for wringing confessions from them."

Though most decisions concerning the use of coerced confessions dealt with more violent forms of duress, as stated by Mr. Justice Frankfurter in his concurring opinion in the *Haley* case *supra*, at page 246:

> "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protractive questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. . . . It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is 'voluntary' simply because the confession is the product of a sentient choice. 'Conduct under duress involves a choice,' (cases cited) and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint."

The conviction, based as it is upon a coerced, involuntary confession, should be reversed pursuant to prior decisions of this Court:

> "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protractive questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal." *Ward* v. *Texas*, 316 U. S. 547, 555.

In the instant case, it is not denied that at least two of these grounds are present, if not all.

Conclusion

Petitioner was indicted by a grand jury from which members of his race were systematically excluded simply because they were Negroes. The record clearly shows further that petitioner's conviction was based upon a confession extorted from him through the use of force, duress and intimidation. The refusal of the Supreme Court of Indiana to reverse the conviction upon the basis of these two federal claims properly presented to it constitutes a violation of rights guaranted petitioner by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of the State of Indiana should be reversed.

ROBERT L. CARTER,
FRANKLIN H. WILLIAMS,
THURGOOD MARSHALL,
Attorneys for Petitioner.

WARREN M. BROWN,
EMERSON J. BRUNNER,
WILLARD B. RANSOM,
HENRY J. RICHARDSON,
Of Counsel.

OCTOBER TERM, 1948

No. 610

ROBERT AUSTIN WATTS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 610

ROBERT AUSTIN WATTS,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

BRIEF FOR RESPONDENT

Opinion of Court Below

The opinion of the Supreme Court of Indiana has not yet been reported officially. It may be found, however, in 82 N. E. (2), 846, and at pages 37-42 of the printed record in the Supreme Court of the United States.

Jurisdiction

The judgment of the Supreme Court of Indiana to be reviewed in this case was entered December 29, 1948. Petition for rehearing denied January 11, 1949. The petition for a writ of certiorari was filed on the 14th day of February, 1949. The jurisdiction of this Court is invoked under the provisions of Section 1257, 28 United States Code.

Questions Presented

A. Whether the trial and conviction of the petitioner was upon an indictment found and returned by a grand jury on which negro members had been excluded solely on account of race or color pursuant to an established systematic and continuous practice, in denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (It is to be noted that the Supreme Court of Indiana decided this point as a question of local procedure. In the lower court an attempt was made to present this question by the device of a motion to quash but the Supreme Court of Indiana ruled that it could only be raised by a plea in abatement.)

B. Whether the confessions of petitioner to State officers was obtained through the use of force, duress, and intimidation and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of Facts

The grand jury of Marion County, Indiana on the 19th day of November, 1947 returned an indictment against petitioner in two counts:

Count 1. Murder in the first degree of Mary Lois Burney.

Count 2. Murder while in an attempt to perpetuate a rape of the one Mary Lois Burney.

Petitioner was arraigned in the Marion Criminal Court on the 22nd day of November, 1947. He entered a plea of not guilty to each count of the indictment and then reserved the right to file any pleadings and reserved the right to change his plea. Upon motion of the petitioner the venue of the action was changed to Shelby County. (Tr. p. 15, 11. 1 to 17). Petitioner then filed a verified

plea of insanity. State filed a Reply in General Denial to said special plea of insanity. Court then granted petitioner's request to withdraw plea of guilty. Whereupon petitioner filed his motion to quash the indictment and each count thereof. After hearing evidence upon petitioner's motion to quash the indictment the Court overruled the same. (Tr. p. 36, l. 27 to p. 37, l. 2) (The evidence at this hearing is to be found in Tr. p. 100 to p. 150 and p. 3 to p. 30 of Transcript of Record). Tr. pp. 12, 13, 23, 24, 28-29, 31-32.

The reason urged by petitioner for the sustaining of his motion to quash was that in the selection of the grand jury, which returned this indictment, negroes were excluded from service because of their race and color.

During the trial petitioner objected to the introduction in evidence of certain written statements allegedly made and signed by petitioner, same being State's Exhibits 26, 27, and 28. Exhibits 26 and 28 are identical except 26 is typewritten and 28 is in longhand. These two exhibits are oral statements made by petitioner to police and then by police written up and later typed. Exhibit 27 is practically the same but stated to the Prosecutor who had same typed. All were read and signed by petitioner, objection to these exhibits being on the ground that same were obtained from petitioner through the use of force, duress and intimidation. Out of the presence and hearing of the jury the trial court accorded a full hearing on the issues presented by the objection. Petitioner's evidence was to the effect that he was not guilty, and that prior to his confession or statement he had been beaten, starved, threatened and otherwise abused to such an extent that he signed the written statements, State's Exhibits 26, 27 and 28 under the influence of fear. These statements were to the effect that he did not kill Mary Lois Burney, the deceased, but that in a struggle with her in an attempt to take the shot gun from her it

accidentally went off shooting her in the neck and face. The petitioner's evidence was contradicted in detail by various witnesses who testified for the State. The trial court overruled the objection of petitioner (Tr. p. 360 to tr. p. 769).

By virtue of Section 9-1706 Burns 1933, 1942 Replacement, the trial court saw fit, before trial, to have petitioner examined by physicians as to his sanity.

The trial began on the 12th day of January, 1948 and ended on the 28th day of January, 1948 when the jury returned a verdict finding the petitioner herein guilty of Murder in the First Degree while attempting to perpetrate the crime of Rape and fixing the punishment therefor to be death in the electric chair, and the petitioner by the trial court was so sentenced. Petitioner entered an appeal to the Supreme Court of Indiana. Thereafter, following a complete and full hearing the Supreme Court of Indiana on December 29, 1948 affirmed the judgment of the trial court.

The material facts concerned the question of exclusion of negroes from grand jury service as well as the facts pertaining to the admissibility of the confessions or statements of petitioner to State authorities, to-wit, Exhibits 26, 27 and 28 which are set forth and discussed in the argument herein.

Argument

I

The record in this case fails to substantiate petitioner's claims that negroes were systematically and intentionally excluded from the grand jury which indicted him in violation of the Fourteenth Amendment to the Federal Constitution and the decisions of this Court.

1

The objection presented by petitioner's first assignment of error was not properly presented to the trial court and

to the Supreme Court of the State of Indiana and therefore no question of a federal nature is before this Court.

Petitioner's objection to the grand jury was by Motion to Quash.

Irregularity in the selection, impaneling or swearing of the grand jury cannot under Indiana procedure be presented by a Motion to Quash but should be presented by Plea in Abatement.

Swain v. *State* (1938), 215 Ind. 259, 18 N. E. (2) 92;
Steinbarger v. *State* (1937), 214 Ind. 36, 14 N. E. (2) 533;
Bottorff v. *State* (1927), 199 Ind. 540, 156 N. E. 555;
Katzen v. *State* (1922), 192 Ind. 476, 137 N. E. 29;
State v. *Jackson* (1918), 187 Ind. 694, 121 N. E. 114.

The statute specifies the ground available for a motion to quash an indictment and nothing outside of the grounds specified is available.

Katzen v. *State, supra;*
State v. *Jackson, supra.*

Section 9-1129 Burns 1933, 1942 Replacement (Acts 1905, Chapter 169, Section 194, page 584), provides:

"The defendant may move to quash the indictment or affidavit when it appears upon the face thereof either:

"First. That the grand jury which found the indictment had no legal authority to inquire into the offense charged.

"Second. That the facts stated in the indictment or affidavit do not constitute a public offense.

"Third. That the indictment or affidavit contains any matter which, if true, would constitute a legal justifica-

tion of the offense charged, or other legal bar to the prosecution.

"Fourth. That the indictment or affidavit does not state the offense with sufficient certainty."

In the case of *Stipp* v. *State* (1917), 187 Ind. 211, 118 N. E. 818 it was said:

"* * * It is true, as stated in 12 R. C. L. 1032, § 19, that: 'If the accused knew that his case would be presented to the grand jury because he had been committed to await its action, he must * * * object to defects in the grand jury's organization by challenge to the polls or to the array. But if he was not in custody or out on bail at the time the grand jury was impaneled, and so had no knowledge that his case would go before the grand jury, and consequently no opportunity to object to its organization before the indictment was found against him, he may make his objection by plea in abatement.'"

See also:

Hitch v. *State* (1936), 210 Ind. 588, 4 N. E. (2) 184;
State v. *Bass* (1935), 210 Ind. 181, 1 N. E. (2) 927;
Mershon v. *State* (1875), 51 Ind. 14.

2.

The record in this case fails to substantiate petitioner's claims that negroes were systematically and intentionally excluded from the grand jury which indicted him in violation of the Fourteenth Amendment to the Federal Constitution and the decisions of this Court.

The Supreme Court of Indiana has never failed to recognize the binding force of the decisions of this Court in:

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;

Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
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Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692;
Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164.

In the case of *State* v. *Bass*, 210 Ind. 181 *supra*, the Supreme Court said:

> "From the earliest times rules and methods have been devised for drawing juries in an effort to insure the selection of disinterested jurors, and with a view to preserving the purity of the jury as an institution. Our statutory method of drawing juries was devised for the purpose of putting the selection beyond suspicion of advantage or favoritism. This result can be achieved only by a strict conformance to the requirements of the statute. The statute, section 4-3304, Burns' Ann. St. 1933, section 1267, Baldwin's 1934, clearly contemplates that no names shall be contained in the jury box, except the names taken from the tax duplicate by the jury commissioners to serve the courts for the current year. The facts alleged, which are by the demurrers admitted to be true, disclose that there were names in the jury box which should not have been there. It is alleged that there was opportunity for names to be inserted in the box by others than the jury commissioners; that the names of two who were active in seeking an investigation of the matters involved in the indictment were in the box. This may have been a mere coincidence, but it furnishes ground for suspicion, and the impartiality of

> juries must be above suspicion insofar as a compliance with the statutory method of selection can make it so. It is for this reason that a grand jury which is not organized in accordance with the statutory requirements is held to be an unlawful jury, and an indictment returned by such a grand jury *will be abated.* * * *" (Our italics)

In the case of *Dixon* v. *State* (1946), 224 Ind. 327, 67 N. E. (2) 138 the appellant filed his written challenge to the entire array of prospective petit jurors, alleging in substance that Sections 4-3301 to 4-3319 Burns 1933, pertaining to grand and petit jurors, were so administered in Vanderburgh County by the administrative officers who are chosen to select the names that are placed in the jury box and who draw the names therefrom, that the names of no negroes are placed in the jury box, or at least no such names are drawn therefrom, and that thereby appellant's rights under the Fourteenth Amendment as a negro being tried for a major felony are effectually destroyed. After quoting from various decisions of the Supreme Court of the United States the Supreme Court of Indiana said:

> "When, as in this case, a claim is properly and timely asserted that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our duty to make inquiry and determination of the facts presented in support of the claim, for equal protection to all is the basic principle upon which justice under law rests. *Pierre* v. *State of Louisiana, supra* (Head note 2, p. 358, of 306 U. S., 59 S. Ct. at page 538, 83 L. Ed. 757). Equal protection of the laws is more than an abstract right. It is a command which the state must protect, the benefits of which every person may demand. It is a safeguard of our constitution which extends to all—the least deserving as well as the most virtuous. * * *
>
> * * * * * * *

"We are, like the jury commissioner who testified, at a loss to know why, during the period under inquiry, no negro was ever drawn for jury service. Nor can we understand why the one jury subpoena for a negro which came to the special deputy sheriff for service during this period, turned out to be for a dead man. With every opportunity to show how this occurred, the State was content to rely upon the idea that it was merely coincidental, or 'for no particular reason' as stated by the jury commissioner who testified. However, it remains an undisputed fact. Whether the jury commissioners intended to discriminate against negroes or not, their action has resulted in a noticeable discrimination. A similar case from the same county was before this court in a *coram nobis* proceeding in *Swain* v. *State* (1939), 215 Ind. 259, 18 N. E. (2d) 921. The evidence before the court in that case showed that some negroes had been drawn on juries in the courts of the county during the period then under investigation, and this court held that the evidence did 'not establish that clear showing of error of fact that would justify us in disturbing the exercise of the trial court's discretion.' In the instant case the question was properly and timely raised and presented. The trial on the challenge to the entire array of jurors was had and determined by the court, prior to the hearing of the case on its merits. No question as to the guilt or innocence of the defendant is presented. His guilt or innocence cannot affect his constitutional right to 'due process' and 'equal protection' of the law. *Hill* v. *Texas*, supra (Head note 2, p. 406, of 316 U. S. at page 1162 of 62 S. Ct., 86 L. Ed. 1559); *Tumey* v. *State of Ohio* (1926), 273 U. S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749, 759, 50 A. L. R. 1243.

"We find no evidence in the record, and no inference that can be properly drawn from the evidence to support the court's ruling. We are convinced the court's ruling is in conflict with that part of § 1 of the Fourteenth Amendment to the Federal Constitution hereinbefore quoted, and with § 44, 8 U. S. C. A. also quoted

herein, and that this ruling deprived appellant of his liberty without due process of law and denied him the equal protection of the laws.

"For this error the cause is reversed with instruction to the lower court to sustain appellant's motion for new trial and for further action agreeable with this opinion."

We respectfully submit that the evidence in the instant case is not such as to establish that clear showing of fact that would justify this Court in disturbing the determination of fact made by the trial court which the Supreme Court of Indiana held to be supported by sufficient evidence.

If it can be said, which we sincerely doubt, that petitioner presented a prima facie case we respectfully submit that the State's evidence was such as to rebut same; that there was ample evidence to support the finding of the trial court.

In brief the evidence is as follows:

Scotty Scott, petitioner's witness, testified that: He resided in Marion County for seventeen years. That he works for a newspaper in Indianapolis. That he did not know of any occasion of negroes serving on the grand jury during his seventeen years of residence. That there are negroes who are property holders competent to serve. That there are by the last estimate of the Chamber of Commerce 65,000 negroes in Marion County. That the general population of the county is about 486,000. That he does not know how grand jurors are selected. Never attended a drawing. Did not know of any discrimination. Did not know if negroes were ever selected and called to serve. That he did not recall having any negro tell him he had been called. Never examined the list to see if negroes ever did serve. Did not know from own knowledge if negroes were probably excluded from the list drawn. Tr. (pr) 4-6, 7.

Thomas Ervin, petitioner's witness, testified that he lived in Marion County twenty-one years and that he had no

knowledge that during that period of time negroes had ever served on grand juries.

William S. Henry, witness for petitioner, testified he resided in Marion County forty-four years. That he had no knowledge of a negro ever having served on a grand jury in the last twenty-five years. Knew of negroes who owned property. That there are between sixty and seventy thousand negroes in Marion County. General population about 486,000. That he has been a lawyer for some thirty-one years and would have particularly known if negroes had served. That a grand jury is chosen twice a year and there are six persons on a grand jury. Has no actual proof of discrimination but it is per se discrimination if there be colored people qualified to serve and are not called. Was not present at the selection of this grand jury. Does not know of his own knowledge that negroes were called and questioned but would gamble that they were not. Never made any investigation to find out if negroes were ever called. (Note that Mr. Henry was attorney for the defense.) Tr. (pr) 8-10.

Al Magenheimer, witness for petitioner, testified he was the sheriff of the county. That he had no knowledge of negroes serving on grand juries in the last twenty-five years. That he also had no knowledge that they had not served. Tr. (pr) 10-12.

Glenn Parish, witness for petitioner, testified that he lived in Marion County for fifty years; that he is deputy clerk, Marion County. That he had no knowledge that within the last twenty-five years negroes served on grand juries. That six persons serve on grand jury and serve for one term of court for six months. That there are two terms—twelve jurors a year. That the names are drawn from a box by the jury commissioners. That each juror's name is written out as drawn. The jury can get the names from the tax

list which includes all the taxpayers of Marion County. That he has seen the tax duplicates. That it does not show thereon whether a person is black or white. He has no evidence of discrimination on the part of the jury commissioners. That actually the county clerk draws out the names from the jury box. That the box is shaken up and then a name drawn out and written down. That there are a good many colored people's names in the box. He has seen that happen many times. Was present the last time a jury was drawn and colored people were drawn and selected. That seventy-five names are drawn at a given time. That the judges of the criminal court appoint the grand jury. Seventy-five drawn in this case—no negro was chosen. Didn't know of his own knowledge if negroes had not served. Doesn't know either way. Can only tell if colored people have been selected and called when they come into court room. That the prosecutor assists in looking up information. That the prosecutor has no authority to pick the jury—assists in advising the court, the same as the clerk or any of them. The court being duly advised acts in certain ways. Tr. (pr) 12-17.

Judson L. Stark, witness for petitioner, testified that he had been a resident of Marion County about twenty-five years. That he didn't know how many negro or colored persons have served on the grand jury, and that he didn't know how many have been called or served during that time, and that he was acquainted with a lot of colored people, and that there are about 65,000 in Marion County, the total population of which is about one-half million. The courts in Marion County by statute hold two terms per year. That that is not true of all courts, but it is of Marion County. The terms run from January 1 to June 30 and then from July 1 to December 31. At the beginning of each six months term, or prior thereto, as a matter of fact in order to select the regular panel for the grand jury and petit jury, the

jury commissioners, upon order of the judge or judges, select, pursuant to law, names to go into a jury box. They select a rather large number. The law has from time to time varied on that subject. The names are selected without regard as to whether they are white or colored. They put them in the jury box; then on the day appointed as provided in the order and pursuant to law, the county clerk takes the box, which is under lock and key (each jury commissioner has a key so that neither can get into it alone). He shakes that around thoroughly, then the jury commissioners open it. The county clerk sticks his hand in and just draws out one name from the box containing a large number of names, both white and colored, and the first name drawn out is written down. Then number two, three, four, five—until about seventy-five, whatever the court has ordered, is drawn. That's the prospective grand jury list. Then they continue until about two hundred names are drawn to make up the regular panel; that is the first panel. Subpoenas are gotten out for those names, ordering them to appear at a given time as prospective grand jurors. When they come to the court room, the two judges sit at the table and the clerk calls the first name; the name of that man goes into the box, it doesn't matter who he is; then they call number two, three, four, five, six. Then the judges begin questioning them to see whether or not they are qualified under the statute to serve as grand jurors. Tr. (pr) 17-28.

There are several reasons that could excuse them. Sometimes one of them will say he is ill, or that his wife is ill, and there are various and sundry other reasons why the court, at its discretion, may excuse one from grand jury service. It is not uncommon to hear pleas of legitimate nature to be released. The prosecuting attorney has no power whatsoever to do any of that. It is true that they have from time to time looked up the qualifications and run the records on names so as to be sure they don't get anyone with bad

background in there. Any information of that kind is gotten at the request of the judge. Otherwise, the prosecuting attorney has nothing whatsoever to do with the selection of the grand jury. He further testified that the selection of the grand jury in the *Watts* case was done regularly and that he was not personally present but that his deputies were, and that he couldn't tell how many names are in the box at the time the names of the grand jurors were drawn, and that he saw the grand jury that was chosen for Robert Watts— there were no negroes on it.

State's Evidence

Judson L. Stark testified that he was the prosecuting attorney of Marion County. That he was the same Judson Stark who testified as witness for petitioner and that he had previously been deputy prosecutor and judge of Marion Superior Court Room #1. That in his official capacity he became familiar with the method of selecting grand jurors in Marion County. There never has been any discrimination or effort to keep names out of the box or keep any colored person in Marion County from serving on either grand or petit jury. That he knew personally that in the last three years three negroes were called, names are drawn from the same box as for the petit jury, and that he knew they have been called and put in the jury box. Was prosecutor when this last grand jury was selected. They were selected in July. His deputy was present. Seventy-five persons were selected from the box, from which is drawn the panel of the grand jury. He did know there were names of colored persons in the box and that they were drawn out. When asked "But you do know that when it came time to make the final selection that it was very convenient for the colored names to be eliminated?", he replied "No, I don't know. It isn't even the truth." The court makes the selection. He testified that he didn't

know why they were excused but did know that finally, when finished, the jury did not have any colored person on it. He didn't know if a colored man ever served on grand jury and had not seen all of them and that it would not surprise him if one had, he would not necessarily know if a colored man ever served on a grand jury. He would just as soon have a colored man on that as a white man. The prosecutor has nothing to say about who is really selected. Make some investigations and then only if anything is very bad. They do run some records. Tr. (pr) 22-28.

Glenn Funk, chief deputy prosecuting attorney since March 1, 1947, testified that names of grand jurors are taken from a list of the taxpayers of Marion County, placed in a jury box and from that box the names are drawn, and that he did know of negroes or colored persons drawn for the grand jury. Two were called in January term, 1948. They did not serve. They asked to be excused. He was present at the selection. The two colored persons were in the jury box. I heard what they said to the judge. Tr. (pr) 28-30.

Cross-examination: Lived in the county twenty-one years. To his knowledge no colored man has served on the grand jury.

From the above it is to be seen that no positive evidence was given by petitioner in support of his claim herein. The negative evidence is such as to bear no weight.

Sec. 4-3301, Burns 1933, 1946 Replacement (Acts of 1881, Ch. 69, Sec. 1, p. 557, Acts 1889, Ch. 195, Sec. 1, p. 438) provides for the appointment of jury commissioners—their oath—instruction.

Section 4-3302 of Burns provides who are ineligible to act as commissioners.

Section 4-3304 Burns (Acts 1881, Ch. 69, Sec. 2, p. 557, Acts 1939, Ch. 132, Sec. 1, p. 656, Acts 1947, Ch. 15, Sec. 1, p. 58) provides for the selection of grand and petit jurors

and special procedure in counties exceeding 400,000 population and is as follows:

"Said commissioners shall immediately, from the names of legal voters and citizens of the United States on the tax duplicate and the tax schedules in the assessor's office of the county for the current year, examine for the purpose of determining the sex, age and identity of prospective jurors, proceed to select and deposit, in a box furnished by the clerk for that purpose, the names, written on separate slips of paper, of uniform shape, size and color, of twice as many persons as will be required by law for grand and petit jurors in the courts of the county, for all the terms of such courts, to commence within the calendar year next ensuing. Such selection shall be made as nearly as may be in equal numbers from each county commissioners' district. In making such selections, they shall in all things observe their oath, and they shall not select the name of any person who is not a voter of the county, or who is not either a freeholder or householder, or who is to them known to be interested in or has a cause pending which may be tried by a jury to be drawn from the names so selected. They shall deliver the box, locked, to the clerk of the circuit court, after having deposited therein the names as herein directed. The key shall be retained by one of the commissioners, ~~not an adherent of the same political party as is the clerk.~~"

Section 4-3306 provides the method of drawing grand and petit jurors and is as follows:

"At 10 o'clock A. M. on the Monday immediately preceding the commencement of any term of any criminal court, or circuit court where there is no criminal court authorized, the clerk, having first well shaken the box, shall open the same in his office, and publicly draw therefrom six (6) names of competent persons, who shall be summoned as the grand jury for such ensuing term; and he shall issue a venire therefor as the court or judge, in vacation, may direct. He shall,

at the time of drawing such grand jury, enter a list of the names so drawn upon the order-book of the court, and annex his certificate of the fact. He shall also, within the same period preceding any term of the circuit, superior or criminal court, in the same manner, draw for each of such courts, respectively, twelve (12) names of persons as petit jurors for such courts, respectively, at such terms; and he shall record and certify such drawing upon the proper order-books of such courts, respectively, as is required concerning the grand jury; and he shall issue venires for such juries as such courts, or the judges thereof in vacation, may direct. In counties where the superior court may have more than one (1) judge, said clerk shall, if so directed by such court or judges, in like manner, draw one or more additional petit juries for such court at any term. After a petit jury has served four (4) weeks during any term of court, such court may, in its discretion, discharge it, and direct the clerk in the same manner, at any time, to draw another petit jury, and summon the same."

II

The confessions, State's exhibits 26, 27 and 28, were not obtained through use of force, duress and intimidation on the part of State Officers and therefore the lower court did not commit error in ruling that same was admissible in evidence.

1

In the case of *Johnson* v. *State* (1948) Ind., 78 N. E. (2) 158, the Indiana Supreme Court said that in determining whether defendant's rights under the due process clause of the Federal Constitution were violated by admission of a confession, it was required to follow what had been determined on the question by the United States Supreme Court. Therein, the Court said at page 160, "We can not permit this judgment to stand if the undisputed evidence suggests

that force or coercion was used to exact the confession even though without the confession there might have been sufficient evidence for submission to the jury. *Malenski* v. *New York*, 324 U. S. 401, 65 Sup. Ct.; *Haley* v. *Ohio*, 68 Sup. Ct. 30," • • • We are bound by, and must follow, what has been determined as to this question by the Supreme Court of the United States. We regard the cases of *Haley* v. *Ohio*, *supra*, and *Malenski* v. *New York*, *supra*, as controlling and upon these cases we base this opinion. According to the principles of law as laid down in these two cases as well as in the cases cited in those opinions it was error to admit the involved confession."

In the instant case it can not be said that the evidence is undisputed but as a matter of fact was contradicted in detail by various witnesses who testified for the State.

In brief the testimony of petitioner was as follows: Arrested November 12, 12:30 P. M. at the Indianapolis City Garage, Asphalt Company by Mr. Reasner, Deputy Sheriff. Was at work at time driving a truck. Went to County jail. Was questioned at State Police Headquarters at quarter till 12 same night in regards the Mary Lois Burney murder. From time of arrest until he went to State Police Headquarters was confined in solitary confinement which is called "the hole" in Marion County Jail. Got bread and water every second day until he signed a statement. Before arriving at State Police Headquarters did not get anything. Place of confinement was an iron cell 10 x 12—little cubby hole in the door—no bed in it—just a toilet—no light—floor of steel sheeting—walls of steel. Did not even get water until arrival at State Police Headquarters. Orders were not to give me any. Clothes were taken away from him. He was given a pair of overalls every time State Police took him out. No heat in there—it was cold in there. Was not told what he was arrested for. Simply asked me when I did any shooting lately. At jail the sheriff although he knew

me and my name all the time asked me my name. Took him to where Mrs. Stout was. She said that was the man. Sheriff shook his head. Grabbed by two deputies—one was Reasner—and rushed out to Reasner's office and then to "the hole". Reasner took me to "hole". At quarter of 12 was taken out. Was thrown a pair of overalls. Practically every deputy sheriff Mageuheimer had down there was unfastening his collar and loosening his black jack trying to threaten him—about 13 or 14 of them. One was Reasner, the other Arns. They had guns on them—they took off their coats, tried to tempt me—Sheriff questioned me then State Police came. Sheriff was the only one who said anything to me. Mr. Shields, (State Policeman) Reasner and about six State Police took me to State Police Headquarters in their cars. Had on handcuffs. At State Police Headquarters was questioned by Shields and Reasner about Mrs. Burney. Later questioned by Major O'Neal and others. Told them he did not even know the woman. *Told them I was willing to take the lie detector.* Was taken to lie detector. Sat on the detector taking test from 2 A. M. till 5:30. No one present but officer giving test. *I told him I did not object to taking the test.* At end of the test the officer said, "I'm convinced that you didn't kill Mrs. Burney, but you know who did. The lie detector says you're holding back something." Told him he did not kill anyone and no use to talk to him about it. Mr. Shields came in, took me upstairs. Introduced to Captain Barton. Was questioned about the murder. *Told Barton if he would come after me would take him to every person's house I've been in in Indianapolis.* They sent a car after me about 9:30 in the morning. *Rode around all day.* Shields and Reasner took me back to jail at 6:30 A. M. (back from Police Headquarters—not from trip around town). Had nothing to eat up to this time. Was hungry. Had no sleep. Taken back to "the hole". On way to jail said to Bob Reasner "*What's the idea, trying*

to get me connected with a murder. You told me you just wanted to see me and now you got me tied up with four or five murders. He said "Well Bob, I'm just a police officer taking orders." In the morning was taken out of cell and out in lobby. They had some women come in. Don't know what they were there for but said "it was me, me, me." They were white people. There about 5:00. Then state police came, three of them. They wanted me to take them every place I had been in Indianapolis. It was about 9:30 A. M. Which I did. *I didn't have any objections.* I didn't have anything to hide. Still did not have anything to eat or drink. Just went around Indianapolis. Stopped at homes. Several homes of women. Police didn't talk to me. They only wanted to know my daily routine on November 12th. Took them out to Betty Cracraft's (Mrs. Stout) house. Told them I was to go by her house—that she was the woman I was supposed to attack that day. After leaving her house I told them I went home. He asked me did I have anything with me or anybody with me. I asked him did he want to know the truth about it. He said yes. *I said yes, I had a shotgun.* He said what time was that. I said between 9:30 and 10:00 A. M. They wanted to know about the gun. Told them I had the gun but would not take them to where it was. They radioed in. A broadcast came over the radio to bring the prisoner into State Police Headquarters. At homes we called at the women said "Yes I have seen him before but what you're talking about, he never did bother me." When we got to Mrs. Stout's, Thursday afternoon, is when they radioed to come in. Got back to State Police Headquarters in afternoon. Sat in room alone for about one hour and twenty minutes. Then was questioned by Captain Barton. *He gave me a cigarette, fed me a whole lot of junk* and expected me to tell that I killed Mrs. Burney. Was questioned about the gun. Told me if I would tell where the gun was he would see the prosecutor

and get me off on second degree murder and manslaughter and a whole lot of stuff. Told him I was not scared to talk about the gun—that the gun was given to me to keep for four or five days. *Told him I did not object to going back on lie detector.* Police got mad—moved me to another room and started taking turns slapping me around. A large number of them—every policeman they got down there. Major O'Neal had some kind of a rubber smacker. Slapped me on the side of my face, my nose started bleeding. Was hit by O'Neal in face, shoulder and on back. Was hit by Captain Barton who said "If we have to break you down this way we will." Barton used his hands. Was kicked in the side by Barton. Then the police took turns—all of them, pushing and slapping me around. They would ask who killed Mrs. Burney and then start in beating again. It went on clear up until 11:30 or 12:00 o'clock that night. Went in this room in the afternoon. All the time was handcuffed. Still nothing to eat or drink, now second or third day without food. Then Captain Barton said they didn't want to get hard with me but just a matter of reasoning they had to sometimes. He then brought a coke. That was midnight and the first I had to eat or drink since arrest. Was weak and hungry. Was questioned about Mrs. Stout. Taken back to jail at about 6:30 A. M. by Shields and Reasner. Nothing said except Reasner remarked about the boys getting rough. Was put back in "the hole." Still had no sleep since arrest. About 8:30 or 9:00 was taken to grand jury room. Been up day and night. There was Fred Lynch, a fellow I worked with at the City Asphalt Company. He was a big politician. Talked to me about all the unsolved murders. Told him I didn't have anything to do with them. He said he didn't think so either. He said he tried like everything to see me but they wouldn't let him—that he knew the prosecutor and the prosecutor got him to come over. Then taken back to jail. Soon Mr. Shields and

Reasner and practically every state police car they got on the force came and took me out in search of a hat or coat I had thrown away. I sat in the car—police made the search in the weeds. Police got cold and then mad. They called me lies and everything. *Didn't take any interest in it or what they said* because I knew I didn't kill anyone. Taken to State Police Headquarters. O'Neal and Shields and Reasner were along. At State Police they talked about the murder. *I was not interested in it* so don't remember all that was said. *Was not worried about it.* Was talking to me but I was not paying any attention. They never expressed an opinion that I killed her but always said that they thought I knew who did it. Went back on lie detector. There several hours. Went on lie detector practically every night until statement was signed. Finishing lie detector *O'Neal got me two hamburgers and half pint of milk.* T at, outside of the coke, this was first food since arrested. It was late afternoon. Was then questioned by O'Neal. He said colored people were getting fired from their jobs and that the Governor had done something about paroles on account of this mess. That I was the cause of it. Said I was crazy. I told him I had been to several hospitals for treatment. Then Barton came in. He talked about the gun. Said he was going to take me out to the Burney home. Showed pictures to me of Mrs. Burney laying in bed. Stayed at State Police Headquarters up to 8:30 A. M. without going back to jail. Was questioned all night. Had no sleep. Nothing further to eat. O'Neal and Barton took me out—said they were going to Mrs. Burney's house but they didn't. Went up to a farm house on a high hill. Was handcuffed. Barton took them off and said "You're a nice boy and you are not going to run away." Major O'Neal went up to house and came around the house—was looking at him. Barton went up around the barn and came back in around the house with his hand on his gun and there was a twenty-five caliber

automatic laying in the seat, as if I was going to run. O'Neal said "You still here." I said "I wouldn't be though" and they started arguing. Captain Barton said "I left my gun here, didn't I?" They went driving on and out to the Burney house. Told them I did not remember the house. Went back to State Police Headquarters. There they showed me what they said were my finger prints on door of Burney house. They tilted the door and I grabbed it. Again questioned about the murder. Police took me out again—wanted me to show them where I had visited. I did so—three troopers—just went riding around Indianapolis. They talked about Mrs. Stout. Went back to State Police Headquarters. Again a lie detector for several hours. At the end wanted to know why they thought I killed Mrs. Burney and they said I was holding something back. Again wanted me to take lie detector. I said "I'm sick of it. If you've got any charge against me for first degree murder you file it." *Wouldn't take any more lie detector tests.* Took me out again to look for the cap. Took me around Mrs. Stout's home. Saw a lot of people searching for something. Was told they were searching for the gun. Knew where it was but would not tell them exactly where. They knew I had the gun from the time I was arrested up to the time I signed the statement. Tr. pp. 360, 375, Thursday morning, Tr. pp. 382, 388, 395, 398, 400, 403, Thursday night, Friday morning. Tr. p. 404. Friday, Tr. pp. 413, 414. 3rd time on lie detector. Tr. pp. 416, 417. Sat. morning. Tr. pp. 426, 428. Sat. afternoon—4th time. Tr. p. 432.

Only time I slept since the arrest was Sunday. Was in jail all Sunday and Sunday night. Was brought back to jail from State Police early Sunday morning. Sunday noon got bread and water. Slept on steel floor. No bed clothes. Left Monday morning. Don't know if to Burney place or State Police. Was then out all day and night. *Was not questioned all the time.* Had two apples to eat. Signed

statements that night. Was at State Police Headquarters. Tr. pp. 440, 442.

Major O'Neal showed me a part of a statement where 500 people were meeting at the Meridian Hill and as far as that was concerned I didn't care about that. He said they were getting impatient and they wanted to know before 4:30 was I going to confess that murder or they would have to do something about it. Said they were going to my house and take my wife and baby out of the house and "You'll never see them any more or hear from them any more."

Watts testimony after an interruption

Was told by the sheriff that I was in cell No. 7 because of the mob outside. He told me this days after I was out of cell No. 7. Asked for an attorney the second day I was in jail. Had no attorney prior to signing statements.

Never ate in county jail from time he was arrested until the statements signed. From time he was arrested—had coke—two sandwiches—pint of milk—after signing was given two sandwiches and milk—all he ate from the 12th to the 18th. No promise made to me prior to signing of statements that he would get life imprisonment—they merely hinted about it. They wanted me to have statements notarized but told them it was bad enough to lie—that he wouldn't swear to it. Tr. pp. 489, 491.

Cross Examination

After signing statement directed officer to where gun was. Had picture taken at location of gun. Identified same. Told them where to find—that same was not covered up. No one questioned me on Sunday. Signed the statements in presence of many witnesses. It is my signature on Exhibit No. 26—also on Exhibit No. 27. Betty Craeraft gave me the shotgun. She is Mrs. Stout. (Points her out.) She

sent me her picture in a letter signed by her. Talked to Fred Lynnes over at the grand jury. Talked with him by myself. Worked with him—he was a city employee. Was alone with him. Major O'Neal gave me cigars after and told Reasner to let me keep them. Took them back to jail and smoked them. That was the first night. I was questioned about the murder. Was never permitted to eat in corridor. At meal time was beaten up. While in the hole was beaten up with some instrument. Tr. pp. 504, 524, 527, 537, 556, 557.

Re direct

Never had visitors until after signing statement. Tr. p. 560.

Was discharged from the Navy. Received a bad conduct discharge September 12, 1944. Tr. p. 608.

Russell Webb testified that he was an inmate of the Indiana State Farm. Was confined in Marion County Jail on the 12th of November, 1947, and was there for some fifty-five days thereafter. Saw Watts when he came into jail. Was placed in cell No. 7. He was in No. 5. No. 7 is what is commonly called "the hole." Same as the others except no cots or bed in there and back end is closed where others have bars. There is a toilet in there, no drinking fountain. Deputy Sheriff said that anyone caught giving him food, water or cigarettes or papers would be put in there also. Said he was in there ten days. No place in that cell block to be fed. The other prisoners fed in dining room on third floor. Know nothing about what food Watts was fed—he just did not eat with us—saw him eat—ate the same as us when he was in cell No. 2. He ate in the big corridor. He had on overalls. He was taken out often. Tr. p. 450.

Cross Examination

We had cots in our cells. After Watts was there a few days he was permitted to be out in the corridor. No running water in any of the cells. Watts had had some trouble in jail with some guy. Don't know whether Watts ever had food or not—he never complained. Never saw him mistreated. When you come in and don't want to ruin your good clothes they give you overalls. Talked to him (Watts) while he was in No. 7—everyone did. No one prevented us from doing so. People could go right up and talk to him. Watts talked to me and others and never said anything about food. When he asked for water we got it for him, I or someone else, and we did anyone else who was in the hole. Tr. p. 465.

Questioned by court

Could see Watts at all times while he was in "the hole." He wore overalls. Saw him come and go from his cell. He walked out himself. He never was handcuffed when he came back into his cell. Gave him water there whenever he asked for it—perhaps some twelve to fifteen times. Saw other prisoners give him water—some twenty times—whenever he would stick his cup out. *He had visitors. He told me his wife came.* Tr. pp. 467, 472.

Re-direct

You could buy tobacco, as much as you had money to.

Re-cross

Watts did have tobacco. Some of his was stolen and a deputy gave him some, also some candy. He had cigarettes. He smoked in his cell. Don't know if he had candy in No. 7. Against the rules for relatives to bring any food to eat.

Alymar Watts. Am wife of the defendant. Had a phone

in the house. Recalls the day husband was arrested. My brother saw him brought in to jail. The sheriff had been out to the house inquiring about him so my brother went down to see what it was about. I visited him in jail. The night he was arrested I called the jail. Third or fourth day after, I called at jail but was told he was at State Police Headquarters. Went to sheriff's office at jail. Nothing said about returning. Visited him after he signed the statement. This was Wednesday. He looked as though he had no sleep and his eyes and face were swollen. Mr. Reasner first called at the house. Knew him. That night they came to house in search of shoes and shirt. Tr. p. 561.

Cross-examination

Police came out looking for shoes and shirt. They told me what they wanted and I invited them in. They got shoes and shirt. Knew that Wednesday was the only day for visiting at jail. When I went down they took Robert out into the sheriff's office where we talked. Hunted up lawyer after I learned he was in jail. Was looking for one. Didn't tell my husband I found one but I did. Didn't send him down as I understood they didn't allow nobody to come down and see him. Talked to lawyer—Mr. Newlin—white attorney. My husband asked me to get him a lawyer. Had lawyer Newlin. Didn't employ him. Whenever I would get ready for the lawyer. I knew I had one that would go on the case and therefore whenever I get ready to I would have him go on this case, but I didn't. I have employed Lawyer Henry since the trial. Husband came home around 10:00 o'clock the day he was arrested. Tr. pp. 571, 574, 577.

Examination by Court

Knew my husband smokes cigarettes, likes candy, but did not bring him any the day I visited him in jail.

Cross-examination

Sherman Lloyd. Was a prisoner in Marion County Jail on the 12th of November. Don't know if there was a bunk in No. 7 or not. Don't know how long he was in No. 7. Could have been less than three or four days. He was then placed in cell No. 2 which was opposite me. Saw him eating and smoking during period from November 12th to the 18th. He ate on the "downs," therefore food had to be brought to him. The crippled, those not trusted, mental, etc., ate on the "downs" and anyone in solitary ate there. That's on the first floor. They eat at same table where visitors come and talk. Same food served there as in main dining room. Any noise at night we could all hear it. If any disturbance in No. 7 we would have heard it. He had overalls over his good clothes at all times. He walked by himself, never needed any assistance. Never observed any marks on him. He never said anything about deputy sheriffs beating him up. If he had been beaten at night we would have heard of it. Talked to him several times while he was in No. 7, during the period of November 12th to the 18th. Never complained about food. *Know as a matter of fact he never missed a meal.* Know he always had food served. Saw empty trays or empty food vessels in the cell block. Cell No. 7 and No. 2 during November 12th to 18th. These two cells were occupied by Watts during that time. Never complained about not getting water—gave him water myself. He was out in the corridor for two days and nights and there got water for himself. Never given orders to refrain from talking to Watts. No orders not to give him cigarettes or candy. Tr., pp. 587, 590, 592.

Re-direct

After a few days in the corridor Watts was locked up in No. 2 and not permitted to get out. He made a very insult-

ing remark to one of the other prisoners about his wife. He said "For all you know I might have been out with your wife." He was a white man. He was then placed in No. 2. There I saw him eat candy.

Watts—Summary of Petitioner's Evidence

Arrested November 12, 1947—12:30 P.M. Placed in jail. Received no food or water in jail. From time of arrest to signing of statement, November 12th to November 18th, the only food or drink he had was a Coca-Cola, two sandwiches, glass of milk, no water. His clothes taken from him and given overalls to wear. At jail at meal times and at night just prior to going to State Police Headquarters would be beaten up by jail attendants with sharp instrument. Was taken from jail every night to State Police Headquarters and questioned. State Police would call in morning for trips in and about Marion County and for questioning. Would be at State Police Headquarters all night. Had no sleep from time of arrest to signing of statement. Was allowed to remain in jail Sunday, November 16th. Was abused—kicked—hit by State Police. One night for several hours all the State Police took turns beating him up. Major O'Neal of State Police used a black jack. Officers struck him in face, head and shoulders, also kicked him in side. At no time was he allowed to see visitors or talk to anyone, not even other prisoners. Asked for lawyers. State Police said there was a mob waiting for him and if he did not confess mob would harm wife and baby. Did say that this latter did not worry him and later said it did. That Mrs. Stout whom he was alleged to have attacked was a friend—she had sent him her picture in a letter, had given him a shotgun the morning of November 12th. It appears he knew personally the sheriff and many of his deputies as well as some of the state police. That he voluntarily took four lie detector tests and then refused

to take more. Likewise voluntarily went with state police, showing them where he had been on the 12th of November. November 13th told the state police about the gun.

Russell Webb—Inmate in jail at time Watts came in. He was placed in cell No. 7, known as "the hole." No bed or cot in there. He ate in the big corridor—wore overalls. He never complained about food. Never saw him mistreated. Talked to Watts when he was in cell No. 7—everyone did. People could go right up and talk to him. We all gave him water. He did have visitors. He said his wife had visited him. He did have tobacco—you could buy all you wanted. Saw deputy sheriff give him cigarettes and candy. Watts did smoke in cell No. 7, "the hole."

Alymar Watts—wife of Petitioner.

My brother was at jail when he was brought in. Called jail the night of November 12th. Was told husband was at State Police. Contacted white attorney, Mr. Newlin, the next day. Wanted to have one when I thought it was necessary. Three days later visited and talked to husband at jail. Employed lawyer Henry the day of trial.

Sherman Lloyd: Inmate in jail at time Watts brought in. Was placed in cell No. 7. Saw him eating, smoking November 12th to 18th. Never any disturbance in the cell. If there had been would and could have heard it. He wore overalls over his good clothes. Never saw any marks on him. Never complained about food or said he had been beaten up. Talked to him often while he was in No. 7. He knew of his own knowledge Watts never missed a meal. Gave him water. Watts was out in corridor two days and night and got his own water.

Testimony of State's Witnesses

Robert Reasner: Arrested Mr. Watts November 12th at 2:40 P. M. Took him to the Marion County Jail. He was placed in solitary confinement in cell No. 7. During period from the 12th to the 18th Watts was also placed and kept in cell No. 2. He was moved from No. 2 to No. 7 the second day after his arrest. There were four bunks in cell No. 2. He had the privilege of sleeping on any one of them. Watts was fed in the jail. The exact dates witness couldn't tell but did know he was fed on the 12th. He was fed then in cell block No. 7. Also know that he was fed in cell block No. 7 on the 13th of November. Other dates do not have any knowledge. Could have been fed and would not have known it. During period from the 12th to the 18th of November 1947 was present with the defendant at State Police Headquarters in the evening. Was present at State Police Headquarters during the questioning on every day that Watts was questioned. He was first questioned on the 12th at 12:00 o'clock the night of his arrest. Was present with Watts at State Police Headquarters Thursday, Friday and Saturday nights. Likewise the following Monday night. Watts did eat at State Police Headquarters, Thursday and Monday nights know about in particular. On Thursday night sandwiches were brought for Robert Watts and saw him eat them. He ate two. They were tenderloin sandwiches. He also had other sandwiches and milk. At no time in his presence did anyone strike or hit Watts nor did anyone threaten him. No statements or promises were made to him to induce him to sign any papers. Did not tell him nor did anyone else tell him in his presence that a mob was forming which might harm him or members of his family if he did not sign a confession by 4:00 A.M. on a particular day. Did not hit him nor did not see anyone hit him with a slapperjack. Don't own one. No one hit

him in his presence with his fist, causing his nose to bleed. Saw Watts sign State's Exhibit 28. Sgt. Shields of the State Police wrote same. Shields received his information to write from Robert Watts. Was present at the time. Was present when Watts signed the exhibit. The signature is that of Robert Watts. State's Exhibit No. 26 was later typed. Exhibit No. 28 is the typed copy. The signature thereon is Robert Austin Watts'. He signed same in front of him. After signing same Watts talked to the prosecutor. Heard conversation between prosecutor and Watts. Prosecutor had conversation dictated to stenographer. Same was reduced to writing, Exhibit No. 27 is what Watts told the prosecutor. The signature thereon is that of Robert Austin Watts. He signed same in my presence. Watts had asked to see the prosecutor alone. They called the prosecutor. No inducement was ever made to Watts to sign this statement nor any promises made to him, nor were any threats made to him. He was never struck in any manner. Watts was removed from the county jail to State Police Headquarters because they didn't have any private questioning room in the county jail. Cell block No. 7—solitary confinement—is used for different purposes—unruly prisoners—Watts was an unruly prisoner on the first night he was put in there. There is nothing to sleep on in cell No. 7. The night of his arrest he was taken to State Police Headquarters about 11:30 P.M. It was between the hours of 6:00 and 11:00 that we learned of the murder of Mrs. Burney and during that time were investigating same. Took Watts out to State Police Headquarters to question him about this murder. Told him why and what we wanted to talk about. He remained at State Police Headquarters until about 2:30 A.M. That night he and Shields talked to Watts. Watts had been given opportunity to sleep the first night from 2:30 P.M. until midnight and had opportunity every day in the jail to sleep. Watts was not in

cell block No. 7 every day. He was taken out after the second day. Talked to Watts in cell block No. 2 several times. Never told Watts that he was just a poor police officer trying to make a living. Tr., pp. 729-754.

On the night of the day he was arrested Watts said that he went to work at 7:00 o'clock, took a load of employees to University Heights. Later picked up a man by the names of Bill who had a shotgun, then went to the home of Mrs. Pooley, knocked on the door, said he had a load of gravel. She said it didn't belong to her. He was permitted to use the phone. That the lady had on a red bathrobe and that her leg was exposed. She went to the bedroom to dress. He peeked into the bedroom. This lady was standing there without any clothes on. She screamed when she saw him and he ran out. From there he went to the home of Mrs. Pike and went in there and asked her if she had ordered the load of gravel. She let him use the phone. They struck up conversation. Mrs. Pike said they were just building a home and all the money they had was in it. He felt sorry for her and never bothered her. From there he went to the home of Mrs. Stout and on the same pretext gained admittance. She granted permission to use the phone. Mrs. Stout went into her bedroom. Watts requested Mrs. Stout to write a receipt on a piece of paper that he had called. She turned to write this note and he grabbed her and picked up a butcher knife. He said she begged him not to use the knife. She would do what he asked if he would not use the knife. He then made her disrobe, but Mrs. Stout plead with him, telling him what she had done for his sake. Mrs. Stout said she was expecting guests and that the back door was unlocked. He thought it should be locked. She went to lock the door but instead ran out and slammed the door. He left the house and drove away in the truck. Tr. pp. 808-812.

Statement of Watts pertaining to Harriett Stout was

reduced to writing Thursday night, November 13th, and was signed by Watts. Exhibit No. 29 is said statement and that is Robert Austin Watts' signature. Tr. p. 813.

Howard Hyslope, witness for State.

I first saw the defendant November 14, 1947 at the Marion County Jail; about 2 o'clock in the afternoon with the defedant, visited several residences in Marion County that he directed us as places where he had either entered the house or attempted to enter. We were with him approximately four hours. During that time there were no threats made against him whatsoever and none of us struck him. He had nothing to eat during that time. Upon our return to State Police Headquarters at approximately 5:30 one of the officers went out and got some sandwiches and milk and I saw him eat two sandwiches. He had eaten at approximately 6 P. M. I was in his presence from about 7 P. M. until about 3 A. M. the next morning. The questioning was interrupted. He was given breathing spells which varied from 10 to 15 minutes. There were 4 or 5 such breathing spells during that time. There was no officer who struck Mr. Watts during that time in my presence and no threats were made against him to my knowledge. I was again in his presence on November 17th. We were gone approximately 4 or 5 hours. Watts directed us the route that he had driven on November 12th. After we returned to State Police Headquarters he had sandwiches and drank some milk. While we were on the trip the occupants of one of the houses gave us some apples and we in turn gave Watts two of them which he ate. No one struck the defendant in my presence that day. I saw no marks of violence upon him either of the days I was with him. During the times I observed him he appeared to walk normal to me. (Petitioner's Brief, Vol. 2, pages 73-75). Tr. pp. 608-624.

The defendant was not questioned for more than an hour at a time without being given a breathing spell, after which the questioning was resumed. (Petitioner's Brief, Vol. 2. p. 78).

Robert O'Neal, witness for State.

I am a State Police Officer of the State of Indiana and am a Major and Executive Officer of the department. I saw the defendant at State Police Headquarters between November 12th and 18th on various days at least once each day except Sunday. I was present when the defendant signed State's Exhibit No. 26. Prior to that time I did not at any time strike the defendant. No one in my presence struck the defendant. I never at any time shoved his head against the wall nor no one in my presence did that. No threat of any kind was made by me or anyone in my presence, neither was any promise or inducement made to the defendant to induce him to sign that paper. The appearance of the defendant had not changed at the time he signed that paper from the time when I had first seen him. The first time I saw him was on Thursday evening around 6 o'clock in Captain Barton's office and at that time I personally bought and paid for some sandwiches and a piece of candy and some milk, which he ate while I talked to him in Captain Barton's office. He drank many cokes at various times. On an occasion I remember seeing Shields bring in a sack containing many tenderloin sandwiches. I also recall Captain Barton giving him some sandwiches. I recall at least three times that he was provided food at State Police Headquarters, other than the times when he was given cigarettes, cokes and candy. I did not at any time see Captain Barton strike the defendant. At the time he signed the statement he was not handcuffed. I did not tell Robert Watts that there was a mob forming to do him any harm. As near as I could determine the statement was

signed by the defendant voluntarily. (Petitioner's Brief, Vol. 2, pages 83-85). Tr. pp. 658-697.

I saw the defendant after midnight at intermittent times at the same place. After midnight Shields and Reasner questioned the defendant. The questioning went on for four or five days at different times. During the rest periods he lolled around in some of our soft chairs. There was no pressure put on him at all. He was usually brought to our office about the same time every evening, along about 5 or 6 o'clock. At no time was he required to stand up longer than 20 minutes or half an hour. There was no pressure used on him at any time during the questioning. (Petitioner's Brief, Vol. 2, pages 87-88.)

I did not shove or push the door in any way so that it would fall towards or slide towards the defendant Watts, when we were in the laboratory. I was never outside of State Police Headquarters with the defendant at any time before he signed the confession. (Petitioner's Brief, Vol. 2, p. 90.)

Watts was returned to the county jail every morning about two or three A. M. No pressure was ever placed on Watts. He talked incessantly. We definitely couldn't stop him. Cross-examination testified that on Thursday night talked to Watts about his family, about his time in service, about his visits around this section of the country visiting in these homes. He said that he had been around the doors of several homes. He said he was a member of a large family and his father was in Cleveland. That he had gone to Cleveland for a medical condition one time because of his medical condition. As to this condition—he said he had these notions to attack white women and he went to Cleveland to see a doctor to see if it could be corrected. He stated these things toward the end of our conversation the first night. (Tr. pp. 673 and 674.)

There was some talk on the first night about his wife. I asked him at one time—I can't identify the night—why his wife hadn't been to see him—if they were mad or something and other than that I don't recall any conversation about his wife. Someone told me that his wife or family hadn't ever been to the jail to make inquiry about him and I asked him why that was, was his wife and family mad at him and he told me he supposed his wife was disgusted with him or something. He never did ask to talk to his wife over the telephone. In the same conversation about his wife I thought it was peculiar that someone hadn't been to the jail to inquire about him. I asked him why he didn't have a lawyer. I was curious about that myself. I felt that he should have one. He never did telephone his wife nor anyone else did in my presence. (Tr. pp. 694-696.) At no time was there any pressure put on this man.

John Barton, witness for State.

I am Captain of Detectives of State Police Department of Indiana. I saw the defendant, Robert Watts, between November 12th to November 18th, 1947, at State Police Headquarters. I saw him every day during that time except Sunday. I took part in questioning him during that time and Thursday, Friday and Saturday nights. During that time I made no promises to him whatsoever in regard to his signing of any statement or confession. At no time did I strike him or hit him in the face with a slapper jack or with my fist. At no time did I kick the defendant in the side and during the times that I was present no one hit, struck or threatened the defendant and I did not make any threats against him myself. I did not at any time tell the defendant there was a mob forming which might harm him or any member of his family. At no time did Major O'Neal and I take the defendant to a secluded spot in Marion

County, remove his handcuffs and leave a 25 automatic gun in the back seat beside him and leave the car. I remember that the defendant had some sandwiches at State Police Headquarters on Thursday night. The defendant was seated at all times I was talking to him with the possible exception of one time Friday he was talked to for a short time while he was standing. The defendant signed State's Exhibit No. 28 early Tuesday morning and I also signed it as a witness. The defendant also signed State's Exhibit No. 26 and I also signed it as a witness. The defendant also signed Exhibit No. 27 and I also signed it as a witness. The defendant signed each of those statements voluntarily. I, or no one in my presence, made any promise to induce the defendant to sign those exhibits. I made no statement or threat to him that would cause fear to induce him to sign the statements nor no one in my presence. (Petitioner's Brief, Vol. 2, pages 91-93.) Tr. pp. 697-727.

Harriett Stout: After testifying to attack made on her by petitioner Watts she said that her maiden name was Harriett Cracraft. That she had never seen Watts prior to November 12th. That she had never written any letters to him, that such a question is utterly revolting, nor had she ever sent him a picture of herself in W. A. C. uniform with a dog. Saw him at the county jail. Sheriff Magenheimer was present. Said that that was the man. Tr. pp. 653-657.

William E. Stockdale, Direct Examination.

I live in Indianapolis, I am in charge of feeding the prisoners in the Marion County Jail. He was fed the same food as the other prisoners. He was fed three times a day. On the first afternoon that he was there at about 2:30 or 3 o'clock he was fed and again at 4:30 that evening. That afternoon the defendant was not served in cell No. 7 but was

fed out at a table on the outside of the cell block. The defendant was late at the 4:30 meal upon a couple of different times and would be as much as two hours late before he was fed upon those particular occasions. (Petitioner's Brief, Vol. 2, p. 253.) Tr. pp. 1911-1918.

Albert Southard, Direct Examination.

I am Commissary Officer of the Marion County Jail. During the time Robert Austin Watts was in the county jail, between November 12th and November 18th, 1947, I received from the defendant $23.91 and during this time the defendant used this money for the purchasing of cigarettes, candy, cakes, and various other items that we have in the Commissary. All of that sum was spent for those items except $4.00 which he had sent out of the jail. (Petitioner's Brief, Vol. 2, p. 254.) Tr. pp. 1919-1922.

Al Magenheimer, witness for the State, testified that Watts was fed and was allowed in corridor after second day. That both his wife and mother visited him—saw him every day, and there were no signs of beating. Watts told him he didn't want a lawyer. Was taken out of cell block No. 7 after two days. Tr. pp. 1875-1902.

Harry Foxworthy, State's witness, testified that when Watts was brought to jail after having been arrested on November 12th, he had bruises and scratches on his body and face and had been bleeding, but marks were gone by next day. Tr. pp. 1863-1869.

Watts testified that he served thirty days at the Indiana State Farm for "prowling." Tr. pp. 1587-1614.

Conclusion

That the burden of proof was not successfully borne by the petitioner. On the contrary, the evidence is clearly in favor of the conclusions reached by the Supreme Court of the State of Indiana.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of the State of Indiana should be sustained.

J. EMMETT MCMANAMON,
Attorney General of Indiana.
FRANK E. COUGHLIN,
Deputy Attorney General.
EARL R. COX,
Deputy Attorney General.
MERL M. WALL,
Deputy Attorney General.

Summary of Argument

It is claimed by petitioner:

First, that the court erred in affirming the conviction of petitioner, a negro, based upon an indictment returned by a grand jury from which negroes had been systematically excluded solely because of race and color, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Second, that the court erred in affirming the conviction of petitioner based upon confessions obtained by state officers through the use of force, duress and intimidation, in violation of the Due Process Clause of the Fourteenth Amendment.

It is the contention of the state that the burden of proof in both instances was upon the petitioner. We further maintain that the burden of proof was not successfully borne by the petitioner. That the evidence in both questions is clearly in favor of conclusions reached by the trial judge and the Supreme Court of Indiana, to-wit: that there was no systematic attempt to exclude negroes from the grand jury—that there was no proof of a systematic effort to exclude negroes from jury service—that the signed statements of petitioner were not obtained by state police through the use of force, duress and intimidation.

One witness, Glenn Funk, testified that within the past two years he knew of two negroes who were drawn as members of a jury in the Marion County Criminal Court but they did not serve. Another witness, Judson L. Stark, the Prosecuting Attorney, testified that the drawing was regular and that names are selected for jury service without regard as to whether they are white or colored; that there were three negroes called on the grand jury venire within the last three years. Another witness, Glenn W. Parish, deputy clerk, testified that no discrimination was shown in

selecting names to go into the jury box, that there are many colored persons' names in the box, and that he had seen the names of colored persons drawn from the box and selected. Several witnesses testified that they had no knowledge of a negro ever having served on the grand jury, but none of these witnesses testified to any facts nor did they testify that they were in a position to know. We submit that this is no proof of a systematic effort to exclude negroes.

Out of the presence and the hearing of the jury the trial court accorded a full hearing on the question of whether the statements were obtained by police through duress and intimidation and the use of force. The petitioner's evidence was to the effect that he was not guilty; that prior to his confession he had been beaten, starved, threatened and otherwise abused to such an extent that he signed his confession under the influence of fear. This evidence was contradicted in detail by the testimony of various competent witnesses who testified for the State. We have no quarrel with the petitioner as to the law. We differ as to the application of the law to the facts. The evidence in this case definitely bears out that the statements were not obtained by duress, intimidation or the use of force.

The petitioner's question on grand jury was presented by a Motion to Quash. Under Indiana procedure this question can not be raised by a motion to quash. Any irregularity in the selection, impaneling or swearing of a grand jury must be raised by a plea in abatement. A motion to quash in an indictment only reaches the matters apparent on the face thereof.

We submit, therefore, that petitioner has presented to this Court no federal question.